SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 202.

SARAH M. JONES, APPELLANT,

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES AND SAMUEL J. GLOVER.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MINNESOTA.

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1 Pleas before the honorable the judges of the circuit court of the United States of America, at the June term of said court, held in the city of St. Paul, in said district, in the year of our Lord one thousand eight hundred and eighty-four, and of our Independence the 108th year.

United States Circuit Court, District of Minnesota. In Equity.

SARAH M. JONES
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

Be it remembered that on this 18th day of May, A. D. 1883, came the complainant above named, by Messrs. Bigelow, Flandrau & Squires, solicitors and of counsel, and filed in the clerk's office of said court her bill of complaint, which is in the words and figures following, to wit:

Bill of Complaint.

Circuit Court of the United States, District of Minnesota. In Equity.

SARAH M. JONES, Complainant,
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER, Defendants.

To the judges of the circuit court of the United States for the district of Minnesota:

2 Sarah M. Jones, of Harrisburg, in the State of Pennsylvania, and a citizen of the State of Pennsylvania, brings this her bill against Matilda A. Van Doren, a citizen of the State of Indiana, Samuel J. Jones, and Samuel J. Glover, both citizens of the State of Illinois; and thereupon your orator complains and says that heretofore, to wit, in the month of April, 1863, Robert H. Jones, who was in his lifetime the husband of your oratrix, died intestate, leaving him surviving your oratrix, his widow, and the defendant, Samuel J. Jones, his son and only heir-at-law.

That during the lifetime of the said Robert H. Jones and at the time of his death he was seized in fee of the one undivided one-fourth part of the lands hereinafter described, which are situated in the county of Ramsey and State of Minnesota, to wit:

The south half of the northeast quarter and the west half of the west half of the southeast quarter of section twenty-six (26); also the east half of the southeast quarter of section twenty-seven (27); also the east half of the northeast quarter of section thirty-five (35), and the southwest quarter of section twenty-six (26), of township twenty-nine north, of range twenty-three (23) west.

That on the decease of the said Robert H. Jones your oratrix became entitled to a dower right and estate in the undivided one-

fourth interest in said above-described lands, which, by the laws of the State of Minnesota, was a life estate in one-third part thereof, and the said Samuel J. Jones became vested with the title in fee to said one-fourth interest in said lands, subject only to said
3 dower right and estate of your oratrix, and that the remaining three-fourths of said land was vested in Alexander Ramsey and others.

That while your oratrix was so seized of said estate in dower of said lands she was informed that the same were about to be involved in litigation, and, having little or no knowledge of business, and being averse to having her name complicated in any lawsuits or controversy, and depending upon the ability and integrity of her son, said defendant, Samuel J. Jones, to conduct any business and defend any lawsuits that might arise out of the ownership of said interest in said lands, and merely for the purpose of facilitating the management and transaction of such business and the conduct of said contemplated litigation, and the better to protect her said interest in said lands, and not with any intention to part with or divest herself of her interest or estate in said lands or any part thereof, she did, on the 30th day of January, 1886, at the request of said defendant, Samuel J. Jones, and for the purposes aforesaid and not other, execute, acknowledge, and deliver to said Samuel J. Jones a quitclaim deed of her said dower interest in said lands, in which deed there was expressed a consideration of one dollar, but your oratrix avers that she never received said consideration or any consideration for said deed or lands from said grantee or from any other person; and your orator further avers that said grantee, Samuel J. Jones, took and accepted said deed under the express understanding and agreement to and with your oratrix that he was to receive the same from
4 your oratrix to enable him better to conduct any business for your oratrix that might arise concerning said lands, but not in any way to acquire any estate in the dower interest of your oratrix therein, and it has ever since said deed been known and understood by and between said defendant, Samuel J. Jones, and your oratrix that he held said deed for the purposes aforesaid and for said purposes only and for no other purposes whatever.

That after the execution of said deed by your oratrix to said Samuel J. Jones for the purposes aforesaid and on or about the 25th day of August, 1871, a certain suit was commenced in the court of common pleas of the county of Ramsey and State of Minnesota by Reuben B. Galusha, administrator of the estate of Andrew J. Jones, deceased, as plaintiff, against Samuel J. Jones and others, for the benefit of the creditors of Andrew J. Jones, the grantor of said Robert H. Jones of said lands, for the purpose of setting aside the deed from said Andrew J. Jones to said Robert H. Jones, which was the litigation expected by your oratrix, and, to avoid being personally complicated in which and for the better protection of her rights, she executed said deed of quitclaim to her said son, Samuel J. Jones, and that said Samuel J. Jones defended said suit successfully and the same was defeated, and the purposes and intentions of the said deed to said Samuel J. Jones was carried out and consummated, but

by the inadvertence, ignorance, and want of business knowledge of your oratrix she never requested or required a reconveyance
5 of her said interest and estate in said lands from said Samuel J. Jones, but confiding in his integrity and fidelity to her interests allowed the said estate and interest to remain vested of record in him.

That on or about the 18th day of October, 1871, an action was brought in the district court of the county of Ramsey and State of Minnesota by William R. Marshall and others, as plaintiffs, and Alexander Ramsey and others, as defendants, the parties to said action being all the persons who appeared of record as the owners of said lands, for the purpose of partitioning the same among said owners thereof, and such proceedings were had and taken in said action that a final judgment or decree of partition of said lands was made therein, and there was set off and allotted in severalty to the said Samuel J. Jones as and for his portion thereof the following-described parts and portions thereof, to wit:

One acre in the southwest corner of the west half of the west half of the southeast quarter of section twenty-six (26), bounded as follows, to wit: Commencing at the southwest corner of said west half of the west half of the southeast quarter of section twenty-six (26), and running thence east one hundred and eighty-three (183) feet; thence north two hundred and thirty-eight (238) feet; thence west one hundred and eighty-three feet (183); thence south two hundred and thirty-eight (238) feet to the place of beginning, which piece of land is now of the value of one thousand dollars.

6 Also the southwest quarter of the northeast quarter of said section twenty-six (26), excepting therefrom one acre in the southeast corner of said southwest quarter of the northeast quarter of section twenty-six (26), and running thence west two hundred and thirty-eight (238) feet; thence north one hundred and eighty-three (183) —; thence east two hundred and thirty-eight feet (238); thence south one hundred and eighty-three (183) feet to the place of beginning, which said land is now of the value of one thousand dollars per acre; also the southeast quarter of the southeast quarter of section twenty-seven (27), which is now of the value of one thousand dollars per acre; also the northwest quarter of the southeast quarter of the southwest quarter of section twenty-six (26), excepting therefrom so much thereof as lies within fifty feet on either side of the center line of the railroad of the first division of the St. Paul and Pacific Railroad Company as now located, which is of the value now of one thousand dollars per acre.

Also the southeast quarter of the southeast quarter of the southwest quarter of section twenty-six (26), which is of the present value of one thousand dollars per acre; also a certain lot or parcel of land in the southeast quarter of the northwest quarter of section thirty-five (35), bounded as follows: Commencing one hundred and sixty-three and nine-tenths feet ($163\frac{9}{10}$) west of the southeast corner of said southeast quarter of the northwest quarter of section
7 thirty-five (35) and running thence north thirteen hundred and twenty (1,320) feet; thence west one hundred and sixty-three

and five-tenths ($163\frac{5}{10}$) feet; thence south thirteen hundred and twenty (1,320) feet; thence east one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet to the place of beginning, which is now of the value of one thousand dollars per acre; also another lot or parcel of land in said southeast quarter of the northwest quarter of section thirty-five (35) described and bounded as follows: Commencing one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet east of the southwest corner of the southeast quarter of the northwest quarter of section thirty-five (35), running thence north thirteen hundred and twenty feet; thence east one hundred and sixty-three and five-tenths ($163\frac{5}{10}$) —; thence south thirteen hundred and twenty (1,320) feet; thence west one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet to the place of beginning, which is of the value now of $1,000 per acre; all of which pieces or parcels of land are in township twenty-nine of range twenty-three, in the county of Ramsey and State of Minnesota.

Your oratrix further avers that in the years 1871 and before said partition suit was determined the said Samuel J. Jones, being indebted to the defendant, Matilda A. Van Doren, in the sum of about $3,600, which said debts was secured by lands in the State of Illinois and Iowa, and the said defendant, Matilda A. Van Doren, being fully advised of all the facts heretofore charged in this bill
8 as to the interest of your oratrix in said lands in Minnesota, and of the character of said deed of quitclaim from your oratrix to said Samuel J. Jones, and for the purposes for which the same had been executed as aforesaid, and that the said purposes and objects had been carried out and accomplished, and that your oratrix in equity had her said dower interest in said lands—

The said Matilda A. Van Doren and the said Samuel A. Jones, conspiring and confederating together to cheat and defraud your oratrix out of her said estate in dower in said Minnesota lands, agreed, the one with the other, that the said securities on said Illinois and Iowa lands should be released to the said Samuel J. Jones and a new security for said sum of thirty-six hundred dollars and accrued interest, together with such sum of money as would be necessary to pay off a certain mortgage held by Samuel A. Briggs on said Minnesota lands, which latter sum the said Matilda A. Van Doren agreed to advance to pay off said Briggs' mortgage and other moneys to be advanced to said Samuel J. Jones by said Matilda A. Van Doren, amounting in all to $10,000 or thereabouts, should be given by said Samuel J. Jones to said Matilda A. Van Doren on said Minnesota lands, whereby and by the use of said security and the foreclosure thereof the said Minnesota lands could be sold and acquired by said defendant, Matilda A. Van Doren.

That William H. Van Doren was the husband of the said Matilda A., and was her duly authorized agent to transact all the business and was fully advised and notified at all times of the rights
9 of your oratrix in said Minnesota lands, and of the terms and conditions on which said quitclaim deed had been executed by your oratrix to said Samuel J. Jones, and the terms and conditions upon which he held said Minnesota lands, so far as the said rights

and interests of your oratrix were concerned, and that said William H. Van Doren did transact nearly all the business of said Matilda A. in his own name, and afterwards transferring the securities taken for such loans to said Matilda A., but your oratrix is unable to state whether the securities taken for said loan of $3,600 — in his name or in the name of said Matilda A., but avers that the money so loaned was the money of the said Matilda A.

That the said William H. Van Doren, so being the husband and agent of the said Matilda A. and being so fully informed of all the rights of your oratrix as aforesaid in said Minnesota lands, fully entered into said conspiracy between said Matilda A. and said Samuel J. and acted as the agent of the said Matilda A. in carrying out and consummating the same, and most of the dealings of the said Matilda A. and Samuel J. connected with the same were conducted, on the part of the said Matilda A., by and through the agency of the said William H. Van Doren.

That in pursuance of said conspiracy to cheat and defraud your oratrix out of her said interest as aforesaid in said Minnesota lands, the said Matilda and William H. Van Doren did release to said Samuel J. Jones the securities held by them or one of them on the said lands in Illinois and Iowa, and did advance more money to said Samuel J. Jones, and did pay off said Briggs' mortgage,
10 which latter was about the sum of —— dollars, none of which money ever was received by your oratrix, but all of which, except the sum that went to pay off said Briggs' mortgage, was appropriated by said Samuel J. Jones and by him applied to his own use and benefit. Your oratrix avers that she does not know what sum of money was advanced by said Matilda A. Van Doren to said Samuel J. Jones in carrying out said conspiracy, except what she can learn from the record of the mortgage given by said Samuel J. Jones to her for the same, and the record of the suit in which said mortgage was foreclosed, and she therefore leaves the said defendants to make said proof thereof as they may be advised.

That as part of said conspiracy, and in order to enable said conspirators to carry out the same, the said Samuel J. Jones, on the 25th day of July, 1871, did execute to said William H. Van Doren his certain promissory note, wherein he promised to pay to the order of said William H. Van Doren the sum of ten thousand dollars six months after the date thereof, with interest at the rate of ten per cent. per annum, payable semi-annually; and to secure the said note he, on the same date, executed, acknowledged, and delivered to the defendant, Samuel G. Glover, as trustee, his certain trust deed or mortgage on the one undivided one-fourth part of all said above-described lands, of which said Robert H. Jones died seized as aforesaid, including in said deed of trust and mortgage the said interest of your oratrix, which said note was afterwards and on the day of the date thereof, and as part of said conspiracy, transferred
11 by the endorsement of said William H. Van Doren thereon to the said Matilda A. Van Doren, and he also, at the same time, assigned said trust deed or mortgage to the said Matilda A.

That as part of the said conspiracy and to carry out the object and intent thereof, and on or about the 26th day of August, 1876, the said Matilda A. and William H. Van Doren, in the name of said trustee, commenced an action in the said district court of the said county of Ramsey and State of Minnesota to foreclose said mortgage or deed of trust, and such proceedings were had and taken in said foreclosure suit that on the 14th day of October, 1876, by and under a decree of said court in said suit, all the lands which had been so set off and allotted to said Samuel J. Jones in severalty by said partition suit were sold under said foreclosure, and were all purchased and bought in by said Matilda A. Van Doren, except the northwest one-quarter of the S. E. ¼ of the S. W. ¼ of sec. 26, T. 29, R. 23, except so much thereof as lies within 50 feet on either side of the center line of the R. R. of the 1st division of the St. Paul & Pacific R. R. Co. as now located, which was sold to one Reuben B. Galusha; and such further proceedings were had and taken in said foreclosure suit that on the 22nd day of May, 1880, a final decree was entered in said foreclosure suit, and the title to said lands was vested in said purchasers.

Your oratrix further avers that she was not a party to said foreclosure suit, and did not know of the existence of said indebtedness of said Samuel J. Jones, or of said trust deed, nor of said
12 foreclosure suit, nor of any matter or thing connected therewith until long after the said suit had been terminated and the title to said lands had been passed to said purchaser, Matilda A. Van Doren, by the final decree in said suit.

Your oratrix further avers that the amount that was found due on said note and trust deed or mortgage, together with interest and costs of suit, was the sum of $8,745.14, and that said lands purchased by said Matilda A. were sold to satisfy that sum and were purchased by said defendant, Matilda A. Van Doren, for said amount and no more.

Your oratrix further avers that on the 16th day of December, 1876, she paid the taxes on the undivided one-fourth of all said lands of which her husband died seized fully believing that she owned her one-third dower right therein, and to protect her said interest and in ignorance of any of the transactions which had been had by and between said defendants and said William H. Van Doren, and that said defendants well knew that she paid said taxes and that your oratrix was still in ignorance of all said facts, and did not inform her of any of said transactions, but availed themselves of said payment, and that said taxes were for the years 1872 and 1873, and amounted to the sum of $1,808.48, and that she now holds the receipts for such payments.

Your oratrix further avers that after said title had become vested in said defendant, Matilda A. Van Doren, by said fraudulent transactions as aforesaid, and on the — day of ——, 1881, the said Matilda A. sold to one William R. Marshall, a *bona fide* purchaser, the
13 southeast quarter of the S. E. ¼ of section twenty-seven of said town. and range for the price and sum of $10,000, and she received the said purchase-money and appropriated the same to

her own use and benefit, and that the said defendant, Matilda A., now holds the title to all the rest of said lands so purchased by her at said foreclosure as aforesaid.

Your oratrix further avers that she has never lived in the State of Minnesota, and now resides in the State of Pennsylvania, and that said William H. Van Doren departed this life in the month of September, 1882, and that before the filing of this her bill she duly demanded of the said defendant, Matilda A. Van Doren, that she exhibit to her an account of the money that she has advanced to said Samuel J. Jones and paid, laid out, and expended in and about the said lands and the said acquisition of the title to the same as aforesaid, and the money she had received from the sale of portions thereof as aforesaid, and duly offered to pay to her all such moneys so paid, laid out, and expended by her as aforesaid, with interest in redemption of said mortgage, and duly demanded that on such payment that she convey to her said lands, and that the said defendant, Matilda A., wholly refused to make any such accounting or to give her any information or satisfaction of or concerning said advances or expenditures, or to convey any part of said lands to her, and wholly denied that your oratrix had any right, title, or interest in said lands or any part thereof; all of which is against equity and good conscience.

14 Your oratrix avers that she is ready and willing to pay to the said Matilda A. Van Doren all sums of money that may be adjudged by this court as necessary to redeem said premises from said mortgage foreclosure, and to do and perform all other acts and things that may be adjudged by this court as necessary for her to do to enable her to redeem said mortgage.

Wherefore your oratrix, being wholly remediless in the courts of law in the premises, and being only able to obtain the redress she is entitled to in this honorable court, prays the judgment and decree of this court that an accounting may be had of all sums paid or loaned to said Samuel J. Jones or paid out in any manner on account of taxes or other outlays and charges made and had in and about said lands, and that the said Matilda A. may be charged with all sums of money received by her or by her said agent, William H. Van Doren, for her on account of such portions of said land as have been sold by them or either of them; and thereupon she prays that she may have the right to pay to said Matilda A. such sum as your honor may direct to enable her to redeem said mortgage, and that she may be adjudged to be entitled on such payment to redeem said mortgage, and that said defendant, Matilda A. Van Doren, may be compelled by said court to receive said money and to convey to your oratrix the said land so purchased by her at said mortgage sale, save and except such portions thereof as she has disposed of to *bona fide* purchasers before the filing of this bill, and that your oratrix may have such other or further or different relief or both in the

15 premises as the nature of the case may require and as may be agreeable to equity.

To the end, therefore, that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed,

and may, without oath, their answer on oath being hereby waived, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief, full, true, perfect, and direct answer make to all and singular the premises aforesaid, may it please your honors to grant unto your oratrix the writ of subpœna of the United States of America, issued out of and under the seal of this court, directed to said defendants, Matilda A. Van Doren, Samuel J. Jones, and Samuel J. Glover, commanding the said defendants, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this court, and then and there to answer all and singular the premises, and to stand to and abide such order and decree therein as to your honors shall seem meet.

And your oratrix, as in duty bound, will ever pray, etc.

BIGELOW, FLANDRAU & SQUIRES,
Solicitors and of Counsel for Complainant.

Endorsed: "Filed May 18, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy."

16 And on the same day, to wit, May 18th, 1883, the following order for the issuance of chancery subpœna was entered of record in the Common Rule Book, page 99, in the words and figures following:

Order for Chancery Subpœna.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

MAY 18TH, 1883.

The plaintiff having filed a bill of complaint in this cause, on application of Bigelow, Flandrau & Squires, solicitors, ordered that a writ of subpœna issue as herein prayed for.

And on the same day, to wit, May 18th, 1883, pursuant to the above order, the following chancery subpœna was issued out of this court; which said subpœna, with the marshal's return endorsed on the back thereof, is in the words and figures following:

Chancery Subpœna.

17 UNITED STATES OF AMERICA, } *ss:*
District of Minnesota, }

The President of the United States of America to Matilda A. Van Doren, Samuel J. Jones, and Samuel J. Glover, Greeting:

You are hereby commanded to appear before our judges of our circuit court of the United States of America for the district of Minnesota, at Saint Paul, in said district, on the first Monday in the month of July next, to answer to the bill of complaint of Sarah M. Jones this day filed in the clerk's office of said court, in said St. Paul, then and there to receive and abide by such order and decree

as shall then or thereafter be made, upon pain of judgment being pronounced against you by default.

To the marshal of the district of Minnesota to execute.

Witness the Honorable Morrison R. Waite, Chief Justice of the United States Supreme Court of the United States of America, at St. Paul aforesaid, this 18th day of May, in the year of our Lord one thousand eight hundred, and eighty-three, and of our Independence the one hundred and seventh year.

[U. S. Circuit Court Seal.]

H. E. MANN, *Clerk*,
By O. J. REYNOLDS, *Deputy*.

MEMORANDUM.—The within-named defendants are notified that unless they enter their appearance in the clerk's office of said court, at St. Paul aforesaid, on or before the day to which
18 this writ is returnable the complaint will be taken against them as confessed and a decree entered accordingly.

H. E. MANN, *Clerk*,
By O. J. REYNOLDS,
Deputy Clerk.

BEIGELOW, FLANDRAU & SQUIRES,
Plaintiff's Solicitors.

Endorsed: Filed May 18th, 1883. H. E. Mann, clerk, by O. J. Reynolds, deputy.

Marshal's Return.

DISTRICT OF MINNESOTA, *ss*:

I hereby certify and return that after making inquiry for the within-named defendants I find that they are not in my district.

H. R. DENNY,
U. S. Marshal,
By HENRY MORRIS, *Deputy*.

19 And afterwards, to wit, on the 25th day of June, A. D. 1883, the following order for the appearance of defendants was entered of record in T. M. "F," page 13, in the words and figures following:

Order for Appearance.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

JUNE 25TH, 1883.

On reading and filing the affidavit of Charles E. Flandrau, *and* of the complainant's solicitors in this suit, and on inspection of the bill of complaint therein, it appearing that said suit is brought to enforce an equitable claim against real estate in this district, and that none of said defendants are inhabitants of the district, and that they cannot be found therein, and that none of them have voluntarily appeared in said suit, it is ordered that said defendants do appear, plead, answer, or demur to the said complainant's bill in this suit

by the first Monday of August, 1883, and that this order shall be served on said absent defendants personally, if practicable, wherever they may be found, by delivering to each of them a certified copy of the same.

R. R. NELSON, *Judge.*

20 And afterwards, to wit, on the 6th day of August, A. D. 1883, the appearance of defendants, Van Doren & Glover, by their attorneys, Messrs. Grant & Gilman, was entered of record in the Common Rule Register, page 88, in the words and figures following:

Appearance.

SARAH M. JONES *vs.* MATILDA VAN DOREN *et al.*

AUGUST 6, 1883.

And now come the defendants, Matilda A. Van Doren and Samuel J. Glover, by W. C. Grant and J. M. Gilman, solicitors, on whose motion it is ordered that the appearance of said defendants be, and the same is hereby, entered.

And afterwards, to wit, on the 7th day of August, A. D. 1883, the following certified copy of order of service — returned by the marshal of the district of Indiana showing personal service *of* defendant, Matilda A. Van Doren; also certified copy of order of service showing personal service upon defendants, Glover & Jones, July 2nd, 1883.

Order of Service of *Matilda A. Van Doren.*

21 Circuit Court of the United States, District of Minnesota. June Term, 1883. In Equity.

SARAH M. JONES

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

JUNE 25TH, 1883.

Present: Hon. R. R. Nelson, judge.

On reading and filing the affidavit of Charles E. Flandrau, one of the complainant's solicitors in this suit, and on inspection of the bill of complaint therein, it appearing that said suit is brought to enforce an equitable claim against said real estate in this district, and that none of said defendants are inhabitants of this district, and that they cannot be found therein, and that none of them has voluntarily appeared in said suit, it is ordered that said defendants do appear, plead, answer, or demur to the said complainant's bill in this suit by the first Monday of August, 1883, and that this order shall be served on said absent defendants personally, if practicable, wherever they may be found, by delivering to each of them a certified copy of the same.

R. R. NELSON, *Judge.*

Endorsed: "Filed June 25th, 1883. H. E. Mann, clerk."

22 UNITED STATES OF AMERICA, *District of Minnesota*, } ss:

I, H. E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original order of service.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, this 25th day of June, A. D. 1883.

[NOTARIAL SEAL.]

H. E. MANN, *Clerk*,
By OSCAR B. HILLIS, *Deputy*.

Endorsed: Filed August 7th, 1883. Oscar B. Hillis, clerk.

Served at Indianapolis, June 30th, 1883, by reading it to Matilda A. Van Doren and by handing her a copy of the same.

ROB'T S. FOSTER,
U. S. Marshal,
By CHAS. FISKE, *Deputy*.

Service	$2 00
St.-car fare	20
Total	$2 20

23 *Order of Service on Samuel J. Glover and Samuel J. Jones.*

Circuit Court of the United States, District of Minnesota. June Term, 1883. In Equity.

SARAH M. JONES
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

JUNE 25TH, 1883.

Present: Hon. R. R. Nelson, judge.

On reading and filing the affidavit of Charles E. Flandrau, one of the complainant's solicitors in this suit, and on inspection of the bill of complaint therein, it appearing that said suit is brought to enforce an equitable claim against said real estate in this district, and that none of said defendants are inhabitants of this district, and that they cannot be found therein, and that none of them have voluntarily appeared in said suit, it is ordered that said defendants do appear, plead, answer, or demur to the said complainant's bill in this suit by the first Monday of August, 1883, and that this order shall be served on said absent defendants personally, if practicable, wherever they may be found, by delivering to each of them a certified copy of the same.

R. R. NELSON, *Judge*.

Endorsed: "Filed June 25th, 1883. H. E. Mann, clerk."

24 UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

I, H. E. Mann, clerk of the circuit court of the United States of America for the district of Minnesota, do hereby certify that I have carefully compared the foregoing copy with the original thereof, which is in my custody as such clerk, and that such copy is a correct transcript from such original order of service.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at St. Paul, in said district, this 25th day of June, A. D. 1883.

[NOTARIAL SEAL.]

H. E. MANN, *Clerk,*
By OSCAR B. HILLIS, *Clerk.*

Endorsed: Filed August 7th, 1883. Oscar B. Hillis, clerk.

I have served the within order personally on the within-named Samuel J. Glover on the 26th day of June, 1883, and upon the within-named Samuel J. Jones personally on the 2nd day of July, 1883, by delivering to each of them a true copy thereof.

A. M. JONES,
U. S. Marshal,
By R. D. SHERMAN, *Deputy.*

Marshal's fees:

2 services	$4 00
2 copies	1 00
Mileage	25
Total	$5 25

25 And afterwards, to wit, on the 31st day of August, A. D. 1883, the demurrer of Matilda A. Van Doren to the bill of complaint was filed in the words and figures following:

Demurrer of Matilda A. Van Doren.

United States Circuit Court, District of Minnesota.

SARAH M. JONES, Complainant,
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER, Defendants.

The defendant, Matilda A. Van Doren, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint to be true in such manner and form as the same are hereby set forth and alleged, doth demur thereto, and for cause of demurrer saith that it appears by the complainant's own showing by her said bill of complaint that she has an adequate, full, and complete remedy at law; also that she is barred by statute and lapse of time of the right to the relief prayed for or any other

relief, and that the complainant hath not by her said bill made such a case as entitles her in a court of equity to any relief from or against the defendant touching the matters contained in her said bill or any of such matters.

Wherefore, and for divers other good causes of demurrer appearing in the said bill of complaint, this defendant doth demur to said bill and to all the matters and things therein contained, and humbly prays the judgment of this honorable court whether she shall be compelled to make any further or other answer to the said
26 bill, and she prays to be hence dismissed with her costs in this behalf sustained.

WM. C. GRANT AND
J. M. GILMAN,
Solicitors for said Defendant.

I hereby certify that in my opinion the foregoing demurrer of Matilda A. Van Doren, defendant, to the bill of complaint in this suit of Sarah M. Jones, complainant, is well founded in law and proper to be filed in said cause.

J. M. GILMAN,
Solicitor and of Counsel for Defendant.

UNITED STATES OF AMERICA, } ss:
District of Minnesota, }

In the Circuit Court of the United States, District of Minnesota.
In Equity.

SARAH M. JONES, Complainant,
vs.
MATILDA A. VAN DOREN, SAMUEL J. GLOVER, and SAMUEL J. JONES, Defendants.

STATE OF INDIANA, } ss:
County of Marion, City of Indianapolis, }

Matilda A. Van Doren, of the city of Indianapolis, in the county of Marion and State of Indiana, being duly sworn, doth depose and say that she is the principal defendant in the above-entitled cause, and that the demurrer on her behalf filed in said cause is not interposed for delay, but is filed in good faith and in furtherance of substantial justice.

27 MATILDA A. VAN DOREN.

Subscribed and sworn to before me, at Indianapolis, this 28th day of August, 1883.

In witness whereof I hereunto subscribe my name and affix my seal the day and year last above written.

[COURT SEAL.] MOSES G. McLAIN,
Clerk Marion County Circuit Court.

Endorsed: "Filed August 31st, 1883. O. B. Hillis, clerk."

28 And afterwards, to wit, on the 18th day of September, 1883, the following order setting the demurrer down for hearing at the October adjournment was entered in the Common Rule Register, page 117, in the words and figures following, viz:

Order Setting Down Demurrer for Hearing.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

SEPTEMBER 18TH, 1883.

Upon motion of Bigelow, Flandrau and Squires, solicitors for complainant, it is ordered that this cause be, and it is, set down for hearing and argument upon the demurrer to the bill herein at the adjourned term of this court, to be held in October next.

And afterwards, to wit, on the 11th day of Oct., 1883, the following order setting demurrer down for hearing was entered in Term Minutes "F," page 131, in the words and figures following:

Order Setting Demurrer for Hearing.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN.

The demurrer in this cause is hereby set down for hearing upon Thursday, October 25th, next, or as soon thereafter as the same can be heard.

29 And afterwards, to wit, on the 6th day of November, 1883, the demurrer aforesaid came on to be heard pursuant to the above order, and was argued and submitted and by the court taken under advisement, as appears of record in Term Minutes "F," page 160, in the words and figures following, to wit:

Hearing on Demurrer.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

The demurrer of Matilda A. Van Doren to the bill of complaint herein coming on to be heard, the complainant appeared, by her counsel, Bigelow, Flandrau & Squires, and the defendant, Matilda A. Van Doren, by her counsel, William C. Grant and J. M. Gilman; thereupon said demurrer was fully argued by the respective solicitors aforesaid, duly submitted, and by the court taken under advisement.

And afterwards, to wit, on the 30th day of November, 1883, the opinion of the court was filed in said cause in the words and figures following, to wit:

30 *Opinion.*

United States Circuit Court, District of Minnesota.

SARAH M. JONES

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GROVER.

Demurrer to bill of complaint.

The relief prayed for is an accounting and permission to redeem from a foreclosure of a mortgage on certain real estate.

The bill alleges that the complainant is the widow of Thomas H. Jones, who died in April, 1883, intestate, leaving surviving him the complainant and Samuel J. Jones, his son and only heir-at-law, and at the time of his death the said Robert H. Jones was seized in fee of an undivided one-quarter (¼) part of certain real estate in Ramsey county, Minnesota.

That upon the death of the said Robert H. Jones the complainant, as his widow, became entitled to the dower right and interest in the said real estate of which he so died seized, viz., a life estate in one-third (⅓) part thereof, and that the said defendant, Samuel J. Jones, became vested with the title in fee thereof, subject to the plaintiff's said dower right. The bill then alleges that while the complainant was so seized of said estate she was informed that the lands were about to be involved in litigation, and, having little or no knowledge of business, and being averse to having her name complicated in any lawsuits, and depending upon the ability and integrity of her son, said Samuel J. Jones, to conduct any business and defend any lawsuits that might arise out of the ownership of said dower interest, and merely for the purpose of facilitating the management of such, and not with any design or intention of divesting herself of any interest in the said business, on January 30th, 1866, at her son's request, conveyed by a quitclaim deed her dower in said interest; and further alleges that her son, Samuel J. Jones, took and accepted said deed under the express understanding and agreement to and with her that he was to receive the same to enable him better to conduct any business concerning the lands, but not in any way to acquire any estate in the dower interest.

Then the bill alleges that in August, 1871, R. B. Galusha, administrator of the estate of one Andrew J. Jones, commenced a suit in the Ramsey county common pleas court against the said Samuel J. Jones and others for the benefit of the creditors of the said Andrew J. Jones, who was the grantor of said Robert H. Jones of said lands, for the purpose of setting aside the deed from the said Andrew J. to the said Robert H., which suit was successfully defended and de-

31 feated and the purpose of the said deed of the plaintiff to the said Samuel J. Jones thereby accomplished, but that her said interest was never reconveyed to her nor did she request the same to be conveyed.

The bill then alleges that in October, 1871, William R. Marshall and others, part owners of said lands, commenced an action in the district court of Ramsey county for the partition of the same, and that a final decree of partition was made therein, whereby there was set off in severalty to the said Samuel J. Jones, as and for his partition thereof, certain tracts, which are described in the bill.

It is then alleged that on the 25th day of July, A. D. 1871, the said defendant, Samuel J. Jones, executed his promissory note for $10,000, payable in six months from date, with interest at ten per cent. per annum, payable semi-annually, to the order of William H. Van Doren, husband of the defendant, Matilda A. Van Doren.

The consideration for the note and mortgage is alleged to have been the liquidation of an indebtedness of $3,500 due from said Samuel J. Jones to the said Matilda A. Van Doren and secured by mortgage on lands in Illinois and Iowa; also the payment of a certain mortgage in favor of one Samuel A. Briggs on said lands in Minnesota (amount not stated) and certain money loaned at the time by said Matilda A. to said Samuel J. Jones.

It is charged that the said Matilda A. and her husband knew of the alleged facts and circumstances under which the plaintiff conveyed her said dower interest to the said Samuel J. Jones, and they and the said Samuel J. Jones conspired together to defraud the plaintiff out of her said interest and vest the title to said lands in said Matilda Van Doren, freed from plaintiff's right of dower therein, and that said $10,000 note and mortgage was a scheme whereby to accomplish that end. As a part of said conspiracy the bill charges that on the 26th day of August, 1876 (over four years after the note fell due), the said Matilda A. Van Doren commenced an action in the district court of Ramsey county for the foreclosure of said mortgage, and that such proceedings were had therein that on the 14th day of October, 1876, by and under a decree of said court in said suit, all the lands which had been so set off and allotted to said Samuel J. Jones in severalty by said partition suit were sold under said foreclosure, and were all purchased and bought in by said Matilda A. Van Doren, except one tract of about ten acres, which was purchased by R. B. Galusha, and that on the 22nd day of May, 1880, a final decree was entered in said foreclosure suit and the title in said lands vested in the said purchasers.

And further alleges that complainant on Dec. 15th, 1876, paid taxes of 1872 and 1873 on ⅓ of all said lands, believing she owned her one-third dower right therein.

The bill states that in said foreclosure suit the amount found due upon said note and mortgage, including costs of suit, was
32 $8,745.14, and that the said lands purchased by the said Matilda A. at said foreclosure sale were sold to and purchased by her for that sum and no more.

It also alleges that in 1881 the said Matilda A. sold forty (40) acres of said land to William R. Marshall, a *bona fide* purchaser, for $10,000, and that she still holds the title to the balance so purchased by her at said foreclosure sale.

The plaintiff also alleges that she was not a party to said foreclos-

ure suit and did not know of the same nor of said mortgage until long after the termination of said suit.

J. M. Gilman and W. C. Grant, solicitors for demurrer; Bigelow, Flandrau & Squires, *contra*.

NELSON, *J.*:

It is necessary to the success of the complainant upon the admitted facts that the defendant should be divested of the legal title obtained by the purchase of the foreclosure sale.

The defendant stands in no better position than the son of the complainant, and to sustain the bill the court must declare the deed to the son absolute and unconditional on its face—a mere power granted by the mother, or that he held the land in trust for her.

The complainant's solicitor insists that the conveyance was a power to do some act in relation to real estate, and appears to disclaim that a valid trust was created, either express or resulting. The legal title confessedly passed by the quitclaim deed. There is no expressed trust declared in the deed, and the purposes for which it is claimed the deed was given is not one which could be the subject of an expressed trust by a conveyance from the mother to the son.

There could be no resulting trust, for the payment of taxes, as alleged in the bill and admitted by the demurrer, is not satisfactory evidence to prove it, besides the deed from complainant to her son refutes it.

The statute of frauds and the rules of evidence will not permit a deed absolute on its face to be changed into one of trust by parol unless there be fraud, accident, or mistake. There is nothing of the kind charged in the bill. Indeed, the allegations are that the deed was executed voluntarily and without accident or mistake or fraud on the part of her son in procuring it, and that it was given merely for the purpose of enabling her son to defend the title to the premises against a threatened suit attacking the same.

Is it a mere power to act for her in the alleged threatened litigation?

It may be conceded that when a trust is properly created which is not authorized by the statute it can be sometimes sustained as a power, but it must be a power recognized as valid by the law
33 relative to powers, and the deed must contain a suitable clause granting the power.

There is nothing in the deed from the mother to her son expressing any design or intention to grant anything different from what was conveyed, and this bill cannot be sustained, in my opinion, without overturning a rule of law and evidence established for the security of all property.

It is not necessary to consider the other questions presented.

Demurrer sustained and decree ordered dismissing bill.

Consult Noel *vs.* Noel, 1st Iowa, 423; Ratliff *vs.* Ellis, 2nd Iowa,

59; 21st Penna. State, 263; 10th Allen, 15 Revised Statutes of Minn.; Uses and Trusts, chap. 63 and chap. 64, defining powers.

Filed Nov. 30th, 1883.

OSCAR B. HILLIS, *Clerk.*

[Endorsed:] Sarah M. Jones *vs.* Matilda A. Van Doren *et al.* Copy. Opinion. Filed Nov. 30, '83. Oscar B. Hillis, clerk.

34 And on the same day, to wit, November 30th, 1883, pursuant to the opinion aforesaid, the following order dismissing the bill of complaint was entered of record in Term Minutes "F," page 183, in the words and figures following:

Order Dismissing Bill.

SARAH M. JONES

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

This cause having been heretofore heard upon demurrer of defendants to the bill of complaint herein, to wit, on the 6th day of November, 1883, and said demurrer having been fully argued by the solicitors for the respective parties herein, duly submitted, and by the court taken under advisement, now, after due consideration thereof and being fully advised concerning the same, the court files its written opinion, wherein the "demurrer is sustained and decree ordered dismissing bill." It is therefore considered, ordered, adjudged, and decreed by the court, pursuant to its said opinion, that the bill of complaint herein be, and it is hereby, dismissed, and that the defendants, Matilda A. Van Doren, Samuel J. Jones, and Samuel J. Glover, go hence without day and have and recover of and against the complainant, Sarah M. Jones, their costs and disbursements herein expended.

35 And afterwards, to wit, on the 13th day of December, 1883, the following order vacating the decree of dismissal and allowing complainant ten days in which to amend her bill was entered of record in T. M. "F," page 204, in the words and figures following:

Order Setting Aside Decree of Dismissal and Granting Complainant Leave to File Amended Bill.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

Ordered, That the decree of dismissal heretofore entered herein be, and the same is hereby, set aside and vacated, and the complainant be allowed ten days in which to amend her bill of complaint.

And afterwards, to wit, on the 25th day of January, 1884 (pursuant to a stipulation filed Dec. 31st extending time to file amended bill), the amended bill of complaint of complainant was filed in the words and figures following, viz:

Amended Bill of Complaint.

Circuit Court of the United States, District of Minnesota. In Equity.

SARAH M. JONES, Complainant,

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER, Defendants.

36 Amended bill.

To the judges of the circuit court of the United States for the district of Minnesota:

Sarah M. Jones, of Harrisburg, in the State of Pennsylvania, and a citizen of the State of Pennsylvania, brings this her amended bill by leave of this court granted for that purpose, superseding thereby her original bill, against Matilda A. Van Doren, a citizen of the State of Indiana; Samuel J. Jones, and Samuel J. Glover, both citizens of the State of Illinois; and thereupon your oratrix complains and says that heretofore, to wit, in the month of April, 1863, Robert H. Jones, who was in his lifetime the husband of your oratrix, died intestate, leaving him surviving your oratrix, his widow, and the defendant, Samuel J. Jones, his son and only heir-at-law.

That during the lifetime of the said Robert H. Jones and at the time of his death he was seized in fee of one undivided fourth part of the lands hereinafter described, which are situated in the county of Ramsey and State of Minnesota, to wit:

The south half of the northeast quarter and the west half of the west half of the southeast quarter of section twenty-six (26); also the east half of the southeast quarter of section twenty-seven (27); also the east half of the northwest quarter of section thirty-five (35), and the southwest quarter of section twenty-six (26), of township twenty-nine (29) south, of range twenty-three (23) west.

That on the decease of the said Robert H. Jones your oratrix became entitled to a dower right and estate in the undivided
37 one-fourth interest in said above-described lands, which by the laws of the State of Minneseta was a life estate in one-third part thereof, and the said Samuel J. Jones became invested with the title in fee to the said one-fourth interest in said land, subject only to the said dower right and estate of your oratrix, and the remaining three-fourths of said land was vested in said Alexander Ramsey and others.

That while your oratrix was so seized of said estate of dower in said lands she was informed that the same were about to be involved in litigation by parties who disputed the title of her said husband to the same, and also that the other parties owning the said three-fourths undivided interest therein desired to have the same partitioned and the respective shares of the said several parties set off to them in severalty, and, having little or no knowledge of business and being averse to personal contact with business matters, she desired to empower

her son, the defendant, Samuel J. Jones, to appear for her and represent her in any proceeding that might involve her interests in said land, and the said Samuel J. Jones was willing to aid her in this respect.

That the said Samuel J. Jones prepared or cause to be prepared an instrument in writing and brought the same to your oratrix and falsely represented to her that the same was a mere power of attorney to be executed by her for the purpose of empowering him to appear for her and represent her in any matter concerning her interest in said land as her attorney-in-fact; that your oratrix relied upon said representations and assurances and believed the same to be true,

38 and, so relying and believing, executed said instrument without reading the same, and she avers that had she read the same she was then so ignorant of business matters that she would not have been able to determine the character or legal import of said paper. She further avers that in executing the same she had no intention whatever with parting with her interest in said land or any part thereof, and had she not fully and implicitly believed said paper so executed by her to be a mere power of attorney for the purposes aforesaid she would not have signed the same, and that in so signing the same she was deceived and mistaken as to the character of said instrument and did not know its true character and legal effect and believed it to be a mere power of attorney as aforesaid, and that she has always up to a very short time, to wit, less than six months before the time of filing this her bill, believed the said paper was a mere power of attorney for the purposes aforesaid and nothing more or different.

Your oratrix further says that as to whether the said Samuel J. Jones, at the time he made said false representations to her concerning the character and legal import of said paper so executed by her, as aforesaid, knew the true nature and character of said paper and intentionally made said representations with the purpose of defrauding and deceiving her she has no positive knowledge, but she believes he was aware of the real character of said instrument and did purposely make said representations to defraud and deceive your oratrix, and she charges such to be the fact.

39 That the said Samuel J. Jones, after having so obtained the execution of said instrument, placed the same on record in the office of the register of deeds of said Ramsey county, State of Minnesota.

That the said paper, instead of being a mere power of attorney, as it was supposed to be by said complainant and fully represented to be by Samuel J. Jones, was in fact a quitclaim deed from the said complainant to the said Samuel J. Jones and a release of her dower estate in said lands to him, which was dated January 30th, 1866, and purported to be given for the consideration of one dollar; but your oratrix avers that she did not receive said one dollar or any other consideration for the execution of said paper, and that your oratrix was wholly mistaken and deceived as to the character and nature of said paper when the same was executed and would never have executed the same had she then known what the character and

nature of said paper was, and that she was led into the execution of the same wholly by her ignorance of business and want of knowledge of such matters and the said false representations of the said Samuel J. Jones.

That having so executed said paper as aforesaid for the purposes aforesaid and for no other and under the mistake growing out of the deceit practiced upon her as aforesaid there was, on or about the 25th day of August, 1871, a suit commenced in the court of common pleas for the county of Ramsey and State of Minnesota by Reuben B. Galusha, administrator of the estate of Andrew J. Jones, deceased, as plaintiff, against Samuel J. Jones and others for the benefit of the creditors of Andrew J. Jones, the grantor of
40 said Robert H. Jones of said lands, for the purpose of setting aside the deed from the said Andrew J. Jones to the said Robert H. Jones, which was part of the litigation expected by your oratrix when she made such supposed power of attorney as aforesaid, and that the said Samuel J. Jones defended said suit successfully and the same was defeated.

That on or about the 18th day of October, 1871, an action was brought in the district court of the said county of Ramsey by William R. Marshall and others, as plaintiffs, and Alexander Ramsey and others, as defendants, the parties to said action being all the persons who appeared of record as the owners of said land, for the purpose of partitioning the same among the said owners thereof, and such proceedings were had and taken in said action that a final judgment or decree of partition of said land was made therein, and there was set off and allotted in severalty to the said Samuel J. Jones as and for his portion thereof the following-described parts and portions thereof, to wit:

One acre in the southwest corner of the west half of the west half of the southeast quarter of section twenty-six (26), bounded as follows, to wit: Commencing at the southwest corner of said west half of the west half of the southeast quarter of said section twenty-six (26), and running thence east one hundred and eighty-three (183) feet; thence north two hundred and thirty-eight (238) feet; thence west one hundred and eighty-three (183) feet; thence south two hundred and thirty-eight feet (238) to the place of beginning, which piece of land is now of the value of one thousand dollars.

41 Also the southwest quarter of the northeast quarter of said section twenty-six (26), excepting therefrom one acre in the southeast corner thereof, bounded as follows, to wit: Commencing at the southeast corner of said southwest quarter of the northeast quarter of section twenty-six (26), and running thence west two hundred and thirty-eight feet (238); thence north one hundred and eighty-three feet; thence east two hundred and thirty-eight feet (238); thence south one hundred and eighty-three (183) feet to the place of beginning, which said land is now of the value of one thousand dollars per acre.

Also the southeast quarter of the southeast quarter of section twenty-seven (27), which is now of the value of one thousand dollars per acre.

Also the northwest quarter of the southeast quarter of the southwest quarter of section twenty-six (26), excepting therefrom so much thereof as lies within fifty feet on either side of the center line of the railroad of the first division of the St. Paul and Pacific Railroad Company as now located, which is of the value of one thousand dollars per acre.

Also the southeast quarter of the southeast quarter of the southwest quarter of section twenty-six (26), which is of the present value of one thousand dollars per acre.

Also a certain lot or parcel of land in the southeast quarter of the northwest quarter of section thirty-five (35), bounded as follows: Commencing one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet west of the southeast corner of said southeast quarter of
42 the northwest quarter of section thirty-five (35), and running thence north thirteen hundred and twenty (1,320) feet; thence west one hundred and sixty-three and five-tenths ($163\frac{5}{10}$) feet; thence south thirteen hundred and twenty feet; thence east one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet to the place of beginning, which is now of the value of one thousand dollars per acre.

Also another lot or parcel of land in said southeast quarter of the northwest quarter of section thirty-five (35), described and bounded as follows: Commencing one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet east of the southwest corner of the said southeast quarter of the northwest quarter of section thirty-five (35), running thence north thirteen hundred and twenty feet (1,320); thence east one hundred and sixty-three and five-tenths feet ($163\frac{5}{10}$); thence south thirteen hundred and twenty feet (1,320); thence west one hundred and sixty-three and nine-tenths ($163\frac{9}{10}$) feet to the place of beginning, which is of the value now of one thousand dollars per acre; all of which pieces and parcels of land are in township twenty-nine (29) of range twenty-three (23), in the county of Ramsey and State of Minnesota.

That your oratrix was not a party to said partition suit.

That your oratrix further avers that in the year 1871 and before said partition suit was determined, the — Samuel J. Jones being indebted
43 to the defendant, Matilda A. Van Doren, in the sum of about $3,600, which said debt was secured on lands in the States of Illinois and Iowa, and the said defendant, Matilda A. Van Doren, being fully advised of all the facts heretofore charged in this bill as to the interest of your oratrix in said land in Minnesota and of the real character of said deed and release of dower, and knowing that the same had been executed by mistake and fraud as aforesaid, and was intended and designed to be a mere power of attorney between the said complainant and the said Samuel J. Jones, and well knowing that your oratrix had *had* her dower interest and estate in said land and had never parted with the same, and not in any way intending, as she then and there alleged and asserted, to cover or implicate the interest of your oratrix as aforesaid in said land, the said Samuel J. Jones and the said Matilda A. Van Doren entered into an agreement wherein and whereby they agreed the one with

the other that they would release the said securities so held by the said Matilda A. against said Samuel J. on land in Illinois and Iowa, and that the said Matilda A. would take a new security on the land of the said Samuel J. in Minnesota for the said sum so owing by the said Samuel J. to the said Matilda A., and for the further sum which the said Matilda A. then and there agreed to advance to pay off a certain mortgage which one Samuel A. Briggs then held on said Minnesota land, which sum necessary to pay off said Briggs' mortgage said Matilda A. Van Doren agreed to advance, together with other sums of money, amounting in the whole, including said sum of thirty-six hundred, to about the sum of ten thousand
44 dollars; that the said Matilda A. did advance said sums or amount of money to said Samuel J. under said agreement, and did release her said security on the land in Illinois and Iowa, and said Briggs' mortgage was paid off, and to secure the said Matilda A. Van Doren for said money the said Samuel J. Jones did agree to execute a mortgage on his said Minnesota land.

That William H. Van Doren was the husband of the said Matilda A. and was her duly authorized agent to transact all her business, and was fully advised and notified at all times of the rights of your oratrix in said Minnesota lands and of the mistake which had been by her made in the character of said quitclaim deed from your oratrix to said Samuel J. Jones, and that the same was designed to be a power of attorney merely and was not intended to and did not divest your oratrix of the dower rights and interests in said estate, and being satisfied with the sufficiency of the title said Samuel J. held in said land as security for the money loaned and advanced by said Matilda A.; all of which knowledge was fully communicated to said Matilda A.

That the said William H. Van Doren did transact nearly all the business of the said Matilda A. in the premises, and your oratrix was informed and believes that the said William H. Van Doren was in the habit of making loans of money of his said wife in his own name and afterwards transferring the securities taken for such loans to said Matilda A.; but your oratrix is unable to say whether the securities taken for said loan of $3,600 was taken in his own name or in the name of said Matilda A., but avers that the money so loaned was the money of the said Matilda A.

That the said William H. Van Doren, so being the husband and agent of the said Matilda A., and having transacted said
45 business for her as aforesaid, did carry out said agreement with the said Samuel J. Jones, and for the said Matilda A. did advance said money of said Matilda A. to said Samuel J. Jones, none of which money was ever received by your oratrix, nor did your oratrix know of such transaction until shortly after the filing of this her bill; but that all of said money was taken and appropriated by said Samuel J. Jones to his own use.

Your oratrix avers that she does not know how much money was so advanced to said Samuel J. Jones by said Matilda A., except as she learns the same from the record of the mortgage given by the said Samuel J. to secure the same and the record of the suit which

was commenced to foreclose the same, and she therefore leaves the said defendants to make such proof thereof as they may be advised.

That to secure the said money so advanced by the said Matilda A. to the said Samuel J. the said Samuel J. did, on the 25th day of July, 1871, execute to the said William H. Van Doren his certain promissory note, wherein he promised to pay to the order of the said William H. Van Doren the sum of $10,000 six months after the date thereof, with interest at the rate of ten per cent. per annum, payable semi-annually; and to secure the said note he, on the same day, executed, acknowledged, and delivered to the defendant, Samuel J. Glover, as trustee, his certain trust deed or mortgage on the one undivided one-fourth part of all of said above-described land of which the said Robert H. Jones died seized as aforesaid, and
46 it was well known by said parties to said trust deed that, by reason of the manner in which said instrument had been procured from your oratrix, *that* said trust deed did not and could not, except through said mistake, cover the interest of your oratrix in said land, and said mortgage was not intended to cover and did not cover, except through said mistake aforesaid, the interest of your oratrix in said land; which said note and mortgage was afterward and on the day of the dates thereof and as part of the transaction of said loan transferred by the endorsement of the said William H. Van Doren thereon to the said Matilda A. Van Doren, and he also, at the same time, assigned said trust or mortgage to the said Matilda A. as part of the said transaction or loan.

That afterwards, on the 26th day of August, 1876, the said Matilda A. and William H. Van Doren, in the name of the said trustee, commenced an action in the district court of the said county of Ramsey and State of Minnesota to foreclose said mortgage or deed of trust, well knowing that the same did not cover the interest of your oratrix in said land, save and except as the same was covered by said paper executed by mistake and fraud as aforesaid, and with the design and intent of cheating and defrauding your oratrix out of the said dower estate in said land, and such proceedings were had and taken in said foreclosure suit that on the 14th day of October, 1876, by and under a decree of said court in said suit, all the land which has been set off and allotted to said Samuel J. Jones in severalty of said partition suit and in which your oratrix had a dower right as aforesaid were sold under said forclosure and were
47 all purchased and bought in by said Matilda A. Van Doren except the northwest quarter of the southeast quarter of section twenty-six of township twenty-nine of range twenty-three, except so much thereof as lies within fifty feet on either side of the center line of the railroad of the first division of the Saint Paul and Pacific Railroad Company as now located which was sold to one Reuben B. Galusha.

And such further proceedings were had and taken in said foreclosure suit that on the 22nd day of May, 1880, a final decree was entered in said foreclosure suit and the title to said land was, as far as said decree could vest the same, vested in said purchaser.

Your oratrix further avers that she was not a party to said foreclosure suit and did not know of the existence of said indebtedness of Samuel J. Jones or of said trust deed, nor of said foreclosure suit, nor of any matter or thing connected therewith until long after said suit had been terminated and the title to said land, as far as the same could be had, passed to said purchaser, Matilda A. Van Doren, by the final decree of said court, nor until shortly before the filing of this her bill.

Your oratrix further avers that she did not know of the character of said quitclaim deed executed by her by mistake as aforesaid or that it was a conveyance at all, and did not discover that it was in form or substance a conveyance, but always supposed it to be a mere power of attorney as aforesaid until after the final decree had been made in said foreclosure suit, nor until about six months before the filing of this her bill; and your oratrix avers that
48 the said Matilda A. and her husband up to a very short time before the filing of this her bill always recognized her rights in said land.

Your oratrix further avers that the amount which was found due on said note and trust deed and mortgage, together with interest and costs of suit, was the sum of $8,745.14, and that said lands purchased by said Matilda A. were sold to satisfy that sum, and were purchased by the said Matilda A. for said amount and no more.

Your oratrix further avers that on the 16th day of December, 1876, she paid the taxes on said individual one-fourth part of all said lands of which her said husband died seized, fully believing that she owned her one-third dower right therein, and to protect her said interest, and in ignorance of any of the transactions which had taken place by and between said defendants and said William H. Van Doren, and that said defendants well knew that she paid said taxes, and that your oratrix was still in ignorance of said transactions, and said defendants did not inform your oratrix of any of said transactions, but availed themselves of said payment, and that said taxes were for the years 1872 and 1873, and amounted to the sum of $1,608.48, and that she now holds the receipts for such payments.

Your oratrix further avers that after said title had become vested in said defendant, Matilda A. Van Doren, by said foreclosure as aforesaid, and on the — day of ——, 1881, the said Matilda sold to one William R. Marshall, a *bona fide* purchaser, the southeast
49 quarter of the southeast quarter of section twenty-seven of said town, and range for the price and sum of $10,000, and she received the said purchase-money and appropriated the same to her own use and benefit, and that the said Matilda A. now holds the title to all the rest of said land so purchased by her at said foreclosure sale as aforesaid; that all of said lands are now and always have been open and unoccupied and not in the actual possession of any one.

Your oratrix further avers that she has never lived in the State of Minnesota and now resides in the State of Pennsylvania, and that the said William H. Van Doren departed this life in the month of September, 1882, and that before the filing of this her bill she duly

demanded of the said defendant, Matilda A. Van Doren, that she exhibit to her an account of the moneys she had advanced to said Samuel J. Jones and paid, laid out, and expended in and about the said land and the said acquisition of the title to the same as aforesaid and the money she had received from the sale of portions thereof as aforesaid, and duly offered to pay to her all such moneys so paid, laid out, and expended by her as aforesaid, with interest, in redemption of said mortgage, and duly demanded that on such payment she convey to her said lands, and that the said defendant, Matilda A., wholly refused to make any such accounting or to give her any information or satisfaction of or concerning said advances or expenditures or to convey any part of said land to her, and wholly denied that your oratrix had any right, title, or interest in said lands or any part thereof, and intends to attempt to take
50 advantage of the mistake in the execution of said instrument as aforesaid and the form thereof to cheat and defraud your oratrix out of her said dower right and estate in said lands and to cut off her right to redeem said mortgage as a doweress in said land, all of which is against equity and good conscience.

Your oratrix avers that she is ready and willing to pay to the said Matilda A. Van Doren all sums of money that may be adjudged by this court as necessary to redeem said premises from said mortgage foreclosures and to do and perform all other acts and things that may be adjudged by this court as necessary for her to do to enable her to redeem said mortgage.

Wherefore your oratrix, being wholly remediless in the courts of law in the premises and being only able to obtain the redress she is entitled to in this honorable court, prays the judgment and decree of this court that an accounting may be had of all sums paid or loaned to said Samuel J. Jones and paid out in any manner on account of taxes and other outlays and charges made and had in or about said lands, and that the said Matilda A. may be charged with all sums of money received by her or by her said agent, William H. Van Doren, for her on account of such portions of said land as have been sold by them or either of them; and thereupon she prays that she may have the right to pay to said Matilda A. such sum as your honors direct to enable her to redeem said mortgage, and that she may be entitled on such payment to redeem said mortgage, and that said Matilda A. Van Doren may be compelled by this court
51 to receive said moneys and to convey to your oratrix the said lands so purchased by her at said mortgage sale, save and except such portions thereof as may have been disposed of to *bona fide* purchasers before the filing of this bill, and that your oratrix may have such other or further or different relief, or both, in the premises as the nature of the case may require and as may be agreeable to equity.

To the end, therefore, that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and may without oath, their answer under oath being hereby waived, and according to the best and utmost of their several and respective knowledge, remembrance, information, and belief full, true, perfect,

and direct answer make to all and singular the premises aforesaid—

May it please your honors to grant unto your oratrix the writ of subpœna of the United States of America, issued out of and under the seal of this court, directed to the said defendants, Matilda A. Van Doren, Samuel J. Jones, and Samuel J. Glover, commanding the said defendants, at a certain day and under a certain penalty therein to be specified, personally to be and appear before your honors in this court and then and there to answer to all and singular the premises and to stand to and abide such order and decree therein as to your honors shall seem meet.

And your oratrix, as in duty bound, will ever pray, etc.

BIGELOW, FLANDRAU & SQUIRES,
Solicitors and of Counsel for Complainant.

52 And afterwards, to wit, on the 25th day of February, 1884, the demurrer to the amended bill of complaint was filed in the words and figures following, viz:

Demurrer to Amended Bill.

United States Circuit Court, District of Minnesota.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

The demurrer of Matilda A. Van Doren, defendant, to the amended bill of complaint of said Sarah M. Jones, plaintiff.

This defendant, by protestation, not confessing all or any of the matters and things in the plaintiff's amended bill of complaint to be true in such manner and as the same is therein set forth and alleged, doth demur to the same, and for cause of demurrer showeth—

1st. That the said plaintiff hath not in and by her said amended bill made or stated such a case as entitles her in a court of equity to any discovery from this defendant or to any relief against her as to the matters contained in the said amended bill or any of such matters.

2nd. That the said plaintiff is barred by lapse of time and by the statute of any and all right of dower in the premises described in said amended bill and every part thereof.

Wherefore, and for divers other good causes of demurrer appearing in said amended bill, this defendant doth demur thereto and humbly demands the judgment of this court whether she
53 shall be compelled to make any further or other answer to said amended bill, and prays to be hence dismissed with her costs and charges in this behalf most wrongfully sustained.

J. M. GILMAN,
W. C. GRANT,
Solicitors and Counsel for said Defendant.

The verification of the demurrer and the certificate required by counsel are hereby waived.

BIGELOW, FLANDRAU & SQUIRES,
Solicitors for Plaintiff.

Endorsed: "Filed February 25th, 1884. Oscar B. Hillis, clerk."

54 And afterwards, to wit, on the 24th day of March, A. D. 1884, the following order setting demurrer down for hearing was entered in the Common Rule Register, on page 136, in the words and figures following:

Order Setting Demurrer for Hearing.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

MARCH 24TH, 1884.

Upon motion of Bigelow, Flandrau & Squires, complainant's solicitors, it is ordered that the demurrer of the defendants to the amended bill of complaint herein be, and the same is hereby, set down for hearing upon Tuesday morning, April 8th, next, at 10 o'clock, or as soon thereafter as counsel can be heard.

55 And afterwards, to wit, on the 8th day of April, 1884, the answer of complainant to demurrer to bill was filed in the words and figures following:

Answer of Complainant to Demurrer to Bill.

United States Circuit Court, District of Minnesota.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et als.*

The demurrant makes two points against our bill:

1st. That the doweress who seeks to redeem this mortgage cannot do so, because her dower right and estate is not involved or incumbered by this foreclosure or the mortgage.

2nd. That the statute of limitations has run against her.

Answer.

1st. A deed of her right in the land was obtained from her by Samuel J. Jones by fraud on his part and mistake on her part. Jones, having thus obtained this deed with the knowledge of the Van Dorens of all the facts concerning the manner in which he had obtained the deed, took a mortgage from him on all the land, including the widow's dower. Her dower is thus at once involved in the transaction, and the mortgage is a lien on it, and she could only by a resort to chancery extricate it from such lien. The mortgagee sells the land, including the dower right, and becomes the purchaser; so far then as the record discloses the dower right passes by the foreclosure. The widow, subsequently finding out that she has been deceived, asks to redeem the mortgage. The mortgagee then re-

56 fuses and denies her right to redeem, seeking thus to take advantage of the fraud first perpetrated by Jones and acted upon by her afterwards in selling and purchasing the dower right. Her claim that the party who has thus possessed herself of the dower estate of the widow cannot be allowed to say that the deed was inoperative to pass the dower, because she has acted upon the deed and claims an advantage under it, which equity will not tolerate. It won't do for her to hold on to one dower right under the foreclosure and at the same time claim that it is not affected by the foreclosure.

A doweress who voluntarily and by contract incumbers her dower right may redeem a mortgage which jeopardizes it; about this there is no doubt. A doweress whose dower right is drawn in question by reason of a fraud being perpetrated upon her has the same privilege.

To illustrate this proposition, suppose Jones and the Van Dorens had induced the widow to join in this mortgage by the same fraudulent devices which Jones practiced upon her as to the deed he obtained from her and she had supposed all along that she had signed a mere power of attorney, would there be any doubt at all that when she discovered the fraud and found her dower slipping from under her that she could not redeem the mortgage and save her rights? Would a court of equity bear the perpetrators of the fraud to say that because she had been induced by fraud to join in the mortgage *that* she could not redeem because, forsooth, a fraudulent mortgage is void?

Where is the difference? She was not a party to the mort-
57 gage directly, but she is placed in exactly the same situation, so far as her dower interest is concerned, by reason of the fraud which involved her in the mortgage exactly as if she was a party to it. There is no room for a doubt on the subject.

Statute of Limitations.

In the first place, this statute cannot be invoked, because her rights to redeem depend upon the facts above enumerated, and as she has been drawn into this mortgage by the fraud which has been practiced upon her she can redeem exactly the same as if she was a party to the mortgage. The 20-year clause in the statute, therefore, cuts no figure in the case whatever; but in no case can any one invoke this statute, except they have been in possession—actual possession—of the land for 20 years and more, and the bill declares that this land has never been in the actual possession of anybody. What right have these mortgagees to invoke this statute? Their rights, if any they have, only commenced when their title under the foreclosure matured, and they have never been in the actual possession of the land at all.

This statute does not apply to dower.

As to the 10-*Year Limitation.*

All statutes of limitation are statutes of repose, and a party only loses his rights by lapse of time, in consequence of his own neglect to prosecute his rights.

Where a fraud has been perpetrated and the party upon
58 whom it has been perpetrated does not discover it for many years he cannot be charged with this negligence, and one statute makes a special exception in his behalf and gives him six years after the discovery of the facts constituting the fraud, and we began this suit within a few months after we were apprised of our rights.

The right to redeem is not cut off by foreclosure proceedings. It seems that the statute does not begin to run in favor of the purchaser until the expiration of the period fixed in the decree for the redemption.

Wood on Limitations of Actions, secs. 224, 225, p. 454.

A mere mortgagee has no rights, save and except to get his money and interest back, and when an action proceeds upon the theory that he is to be so reimbursed a court of equity will not look for objections against the party offering to redeem if he brings himself within the law. The mortgagee under a redemption gets all he ever contracted for when he gets his principal and interest, costs and expenses; all of which we will be compelled to pay to redeem.

On the whole, we think both the objections raised by the defendants to our bill are untenable. We were defrauded into placing ourselves in the position we are now found. The defendants all concurred in perpetrating the fraud. We acted the moment we discovered our rights. No negligence is chargeable to us. We are entitled to the relief we demand.

BIGELOW, FLANDRAU & SQUIRES.

Endorsed: "Filed April 8th, 1884. O. B. Hillis, clerk."

59 And on the same day, to wit, April 8th, 1884, the following motion to strike the amended bill from the files was filed, in the words and figures following, viz:

Motion to Strike Amended Bill from the Files.

United States Circuit Court, District of Minnesota. In Equity.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et als.*

The said defendant, Matilda A. Van Doren, by her counsel, moves to have the amended bill of complaint in this action stricken from the files, for the reason that the same is not in form, substance, or effect an amendment to the original bill, but a new and different alleged cause of action in this suit, to wit, the gist of the cause of action alleged in the original bill is that the plaintiff conveyed her dower interest to Samuel J. Jones for a special purpose, which made him a trustee of an express trust, and that the property had come to the defendant charged with such trust; whereas the amended bill charges that Samuel J. Jones procured the conveyance from her by fraud, which, if true, would create in him a resulting trust by

operation of law. The original bill was based upon an alleged expressed trust, while the amended bill is based upon alleged fraud whereby a resulting trust arises.

W. C. GRANT AND
J. M. GILMAN,
Solicitors and Counsel for Defendant.

60 And on the same day, to wit, April 8th, 1884, the hearing on demurrer, also defendants' motion to strike out amended bill, was heard by the court, said order being entered of record in T. M. "F," page 327, in the words and figures following:

Order on Hearing.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et al.*

APRIL 8TH, 1884.

This day come the parties, the complainant by Bigelow, Flandrau and Squires, her solicitors, and the defendants by J. M. Gilman and William C. Grant, their solicitors, and the demurrer to the amended bill herein, also defendant's motion to strike the amended bill from the files herein, coming on to be heard, the same are fully argued by the respective solicitors, duly submitted, and by the court taken under advisement.

61 And afterwards, to wit, on the 7th day of May, 1884, the following opinion sustaining the demurrer to the amended bill was filed in the words and figures following, viz:

Opinion Sustaining Demurrer.

United States Circuit Court, District of Minnesota.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN *et als.*

Demurrer to amended bill in equity.

MAY 7, 1884.

For the facts see opinion in demurrer to original bill on file.

Bigelow, Flandrau & Squires, solicitors for complainant; John M. Gilman and W. C. Grant, solicitors for defendant.

NELSON, *J.:*

The demurrer is sustained for the reasons:

1st. If the allegations of the bill of complaint are true, the right of the complainant to bring her action to recover dower exists unless the statute of limitations of the State of Minnesota have barred such recovery. Of course, if she has lost all right of action by laches, the bill must fail, for the relief claimed is based upon an interest in the property as doweress.

2nd. If not barred by the statute of her action to recover
62 dower, the fraud alleged, which creates an impediment to a

recovery at law, can be removed by a suit in equity and her dower obtained.

Equity furnishes the most adequate and complete remedy, and dower is highly favored in that form.

3rd. The complainant is not entitled by the fraud alleged, if true, to anything more than dower; she is not entitled to the whole property.

If by a fraud perpetrated upon her, which the defendants were cognizant of and participated in, as alleged, she has been prevented from asserting her right to dower by a suit at law, she is not thereby deprived of all remedy to recover it.

The relief prayed for in this bill as amended does not necessarily follow from the facts alleged therein and admitted by the demurrer.

The demurrer goes to the relief prayed; and, not being entitled to the relief, the bill must fall.

In the original bill the relief claimed was based upon the admitted allegation that the quitclaim deed was voluntarily given, and accompanying it was a parol trust for the benefit of the grantor, known to the defendants at the time the property was mortgaged.

This bill was held bad on demurrer for the reason that such a trust as alleged could not be created and recognized, it being in violation of the laws governing uses and trusts, which were specially defined by the statutes of Minnesota. The amendments have changed the features of the bill, and it is doubtful whether
63 they are proper; but I have overruled a motion to strike them from the files and decided the demurrer upon the bill as amended.

Demurrer sustained.

Endorsed: "Filed May 7th, 1884. Oscar B. Hillis, clerk."

And on the same day, to wit, May 7th, 1884, pursuant to the opinion as the above, the following order was entered of record in T. M. "F," page 343, in the words and figures following:

Demurrer Sustained and Motion to Strike Amended Bill from the Files Overruled.

SARAH M. JONES *vs.* MATILDA A. VAN DOREN.

The demurrer to the amended complaint having been heretofore fully argued, duly submitted, and by the court taken under advisement, now the court, after due consideration thereof, and being fully advised in the premises, files its written opinion concerning the same. Pursuant thereto it is by the court ordered that said demurrer be, and the same is hereby, sustained, and that the motion to strike the amended bill from the files, submitted at the same time, be overruled.

64 And afterwards, to wit, on the 17th day of July, A. D. 1884, the following decree of dismissal was entered of record in T. M. "F," page 440, in the words and figures as follows:

Decree of Dismissal.

SARAH M. JONES
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

The demurrer to the amended complaint herein having been heretofore sustained by the court, and the motion to strike the amended bill from the files having been heretofore overruled, now this day comes the defendant, by her solicitor, J. M. Gilman, upon whose motion it is ordered, adjudged, and decreed by the court that the bill of complaint herein be, and the same is hereby, dismissed, and that the defendant go hence without day and do have and recover of and from the plaintiff her costs and disbursements, to be taxed.

65 And afterwards, to wit, on the 13th day of August, 1885, the following petition for appeal was filed in this cause, said petition being in the words and figures following, viz:

Petition for Appeal.

Circuit Court of the United States, District of Minnesota.

SARAH M. JONES
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

To the circuit court of the United States for the district of Minnesota and to the judges thereof:

The above-named complainant respectfully represents to your honors that on the 17th day of July, 1884, a final decree was made by this court in the above-entitled cause dismissing the complainant's amended bill therein on a demurrer by said defendant, Matilda A. Van Doren, to said bill, and that said complainant is advised by counsel and verily believes that there is error in said decree; that the amount involved in said cause largely exceeds the sum of five thousand dollars.

Wherefore your petitioner prays this honorable court to allow an appeal from said decree to the Supreme Court of the United States, and to fix the amount of the bond which your petitioner shall give on said appeal, and to sign the proper citation therein.

BIGELOW, FLANDRAU & SQUIRES,
Solicitors for Complainants.

Endorsed: "Filed Aug. 13, 1885. O. B. Hillis, clerk."

66 And on the same day, to wit, Aug. 13th, 1885, the order allowing appeal was entered in Term Minutes "F," page 700, in the words and figures following, viz:

Order Allowing Appeal.

United States Circuit Court, District of Minnesota.

SARAH M. JONES

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

On reading and filing the petition of the complainant in the above-entitled cause praying for an allowance of an appeal from the final decree entered in said cause on the 17th day of July, 1884, dismissing the complainant's amended bill in said cause, it is ordered that an appeal be, and the same is hereby, allowed from said decree to the Supreme Court of the United States, and that the bond on said appeal be in the sum of two hundred and fifty dollars.

R. R. NELSON, *Judge.*

And afterwards, to wit, on the 26th day of August, A. D. 1885, the following disclaimer of complainant was filed in the words and figures following:

Disclaimer of Complainant.

67 Circuit Court of the United States, District of Minnesota.

SARAH M. JONES, Complainant,

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER, Defendants.

To whom it may concern:

The above-entitled suit involves the title to certain lands, situate in Ramsey county and State of Minnesota, which are described in the bill and amended bill of complaint therein, among which lands is the following-described piece or parcel situate in said county and State, to wit:

"The northwest quarter of the southeast quarter of the S.W. ¼ of section twenty-six (26), excepting therefrom so much thereof as lies within fifty feet on either side of the center line of the railroad of the first division of the St. Paul and Pacific Railroad Company, as now located."

Now, therefore, know ye that I, Sarah M. Jones, the above-named complainant, hereby withdraw all claim to said land by me made or asserted in said suit, and fully discharge said piece of land from all the consequences or effects of said suit, not, however, intending or meaning hereby to affect in any manner my claims to or rights or interest in any of the other pieces or parcels of land described in said bill and amended bill of complaint, and not hereby meaning in any way to influence or affect any of my rights as-

68 serted and claimed in said suit, save and except to discharge

said herein-described parcel of land from the effects of said suit as aforesaid.

BIGELOW, FLANDRAU & SQUIRES,
Complainant's Solicitors.

[Endorsed:] Filed "Aug. 26th, 1885. Oscar B. Hillis, clerk."

And afterwards, to wit, on the 31st day of August, A. D. 1885, the following bond was filed in the words and figures following, to wit:

Bond on Appeal.

Circuit Court of the United States, District of Minnesota.

SARAH M. JONES
vs.
MATILDA A. VAN DOREN, SAMUEL J. JONES, and SAMUEL J. GLOVER.

Know all men by these presents that we, Sarah M. Jones, of Harrisburg, Pennsylvania, as principal, and Victor Robertson, of Fort Snelling, Minnesota, and William G. Robertson, of St. Paul, Minnesota, as sureties, are held and firmly bound unto Matilda A. Van Doren, Samuel J. Jones, and Samuel J. Glover in the sum of two hundred and fifty dollars; for the payment of which, well and truly to be made to said obligees, their heirs, executors, administrators, and assigns, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 26th day of August, A. D. 1885.

69 The condition of this obligation is such that whereas a final decree was entered in this court in the above-entitled cause on the 17th day of July, 1884, dismissing the complainant's amended bill therein in favor of the said defendant, Matilda A. Van Doren, who demurred to said amended bill and for costs; and whereas an appeal from said decree has been duly allowed by this court to the Supreme Court of the United States:

Now, therefore, if the said appellant in said appeal shall prosecute her said appeal to effect and shall fail to make good her plea and shall answer and pay all costs which may be awarded and adjudged against her, then this obligation shall be void; otherwise in full force and effect.

SARAH M. JONES, [SEAL.]
By BIGELOW, FLANDRAU & SQUIRES,
Her Attorneys.

VICTOR ROBERTSON.
WILLIAM G. ROBERTSON.

Signed, sealed, and delivered in the presence of—
JAVED S. HOW.
FRANK WARNER CUTCHEON.

Supreme Court of the United States.

SARAH M. JONES,

Appellant,

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES and SAMUEL J. GLOVER,

Respondents.

BRIEF OF APPELLANTS.

ABSTRACT, OR STATEMENT OF THE CASE.

Robert H. Jones, in his lifetime, was seized in fee and possessed of an undivided one-quarter of certain lands situate in Ramsey county, state of Minnesota. He died in the month of April, 1863, still so seized of said lands. On his death the complainant, Sarah M. Jones, his widow, became, under the laws of Minnesota, entitled to a dower interest in said lands, which at that time was a life estate in one-third of the same. The defendant Samuel J. Jones was the only child of the said Robert H. Jones and his sole heir-at-law, and consequently, on the death of his father, became the

owner-in-fee of the said undivided interest in said lands, subject only to the dower-interest of his mother, Sarah M. Jones, the complainant.

The interest of Robert H. Jones in said lands after his decease was threatened with litigation which attacked his title, and also with litigation which was aimed at a partition of the lands between his widow, his heir, and the parties who owned the other three-quarter interest.

The widow knew nothing of business, and was averse to having her name connected with this litigation; and being desirous that her son, Samuel J. Jones, should take care of her interests, executed to him a paper which, on his false and fraudulent representations, she believed to be a mere power of attorney to represent her in the litigation. This paper was executed on the 30th day of January, 1866, and was in fact a quit-claim deed from her as grantor to him as grantee, and conveyed to him on its face all her interest in the land.

The anticipated litigation took place; R. B. Galusha, as administrator of the estate of Andrew J. Jones, for the benefit of the creditors of Andrew J. Jones, who was the grantor of Robert H. Jones, commenced an action on August 25, 1871, for the purpose of setting aside the deed from Audrew J. to Robert H. Jones, in which suit the plaintiff was defeated; and the partition suit was commenced on October 18, 1871, and the lands divided among the respective owners, one-fourth part thereof being set apart to Samuel J. Jones.

In the year 1871 and before the determination of the partition suit, Samuel J. Jones was indebted to Matilda A. Van Doren in the sum of about $3,600,

which said debt was secured on lands in Illinois and Iowa. Said Matilda A. Van Doren and her husband at this time knew all about the manner in which Samuel J. Jones had procured the quit-claim deed from Sarah M. Jones, his mother, and that the same was fraudulently obtained, and was supposed by the grantor therein to be a mere power of attorney to appear for her and protect her interests in the litigation above referred to; and being thus fully advised of the relation that existed between Samuel J. Jones and his mother under said instrument, said Matilda A. Van Doren, together with her husband and Samuel J. Jones, conspired together to cheat and defraud the mother out of her dower interest in said lands, by the said Matilda A. Van Doren loaning to the said Samuel J. Jones a sum of money sufficient to pay off a mortgage held by one Briggs on the interests of said Samuel J. in said Minnesota lands, and to pay off said debt of $3,600 then owing by said Samuel J. to said Matilda A.; amounting in all to about the sum of $10,000, and securing the whole sum by mortgage on the interest as it then appeared of record, of the said Samuel J. in said Minnesota lands, and by and through said mortgage and a foreclosure thereof the title to said lands could be acquired by said Matilda A. Van Doren.

William A. Van Doren was the husband of said Matilda A, and was her agent to transact all her business and invest her money. And he was fully informed of the fraudulent manner in which the quit-claim deed had been obtained from Mrs. Sarah M. Jones and knew all about the transaction. He was in the habit of loaning the money of his wife in his own name, and he entered into the conspiracy with

his wife and Samuel J. Jones to cheat Sarah M. Jones out of her interest in said lands, and to carry it out he loaned a sum of his wife's money to said Samuel J. Jones and took a note in the sum of $10,000, and a mortgage to secure the same on the interest of said Samuel J. in said lands as the same then appeared of record, in his own name. This note and mortgage were executed on the 25th day of July, 1871, and were made payable in six months from date, and were on the same day transferred and assigned by the said William A. Van Doren to his wife, Matilda A. Van Doren.

On August 26, 1876, a suit was commenced to foreclose the mortgage given by Samuel J. Jones on the land in question, and under a decree rendered in said action, the lands were, on the 14th day of October, 1876, sold, and were all purchased in by Matilda A. Van Doren, except a small piece which is described in the bill of complaint, and on the 22d day of May, 1880, a final decree was entered in said action vesting the title to said lands in the purchasers under the decree.

The complainant, Sarah M. Jones, was not a party to this action, and knew nothing of the indebtedness of Samuel J. to Mrs. Van Doren, nor of the further loan made by her to him, nor of the mortgage, or its foreclosure until shortly before the filing of her bill in this cause.

The lands were sold under the foreclosure for $8,745.14, and purchased by Mrs. Van Doren for that sum.

The complainant on the 16th day of December, 1876, paid the taxes on the undivided one quarter of all the lands above mentioned for the years 1872 and 1873, fully believing she held a dower interest therein. The

defendants knew of this payment of taxes and availed themselves of it. The payment amounted to $1,808.48.

After the title had matured in Matilda A. VanDoren under the foreclosure, and in the year 1881, she sold a portion of said lands so purchased by her to one William R. Marshall a *bona fide* purchaser for the sum of $10,000, all of which she received and appropriated.

William A. Van Doren, husband of Matilda A. died in September, 1882, and before filing her bill in this cause the complainant demanded of Matilda A. Van Doren an accounting under said transaction, and offered to pay her all moneys she had loaned or expended, with interest, in redemption of said mortgage, and demanded a conveyance of the lands so purchased by said Matilda and remaining unsold by her, all of which she refused. And the complainant has always remained ready and willing to pay to said Matilda A all sums of money that may be necessary to redeem said lands from sale under said mortgage.

These are the facts alleged in the amended bill of complaint herein, which was demurred to by the defendant Matilda A. Van Doren. The defendant Glover putting in an appearance in the cause and the defendant Jones not appearing.

There has been filed in this cause, an original and an amended bill. The original bill was demurred to by the defendant Matilda A. Van Doren, which demurrer was sustained by the circuit court, which court allowed the complainant to file an amended bill, which amended bill was also demurred to by defendant Matilda A. Van Doren, and her demurrer was again sustained by the circuit court.

The original bill is found in the record on *pages 1 to 8 inclusive*. The demurrer thereto is found on *pages 12 and 13*. The opinion and decision of Judge Nelson on the demurrer to the original bill is found on *pages 15, 16 and 17*. The amended bill is found on *pages 19 to 27, inclusive*. The demurrer to the amended bill is found on *page 27*. And the decision of the court upon the demurrer to the amended bill is found on *pages 31 and 32*.

SPECIFICATION OF ERRORS RELIED UPON BY THE APPELLANT.

The court below erred in sustaining the demurrer of the defendant Matilda A. Van Doren to the amended bill of complaint in this cause for the reasons set forth hereinafter.

ARGUMENT OF APPELLANT.

When the original bill was drawn, the pleader recognizing that the relation of mother and son existed between the complainant and the defendant Samuel J. Jones, endeavored to allege the cause of action without charging the perpetration of a direct fraud by the son upon the mother in obtaining the quit-claim deed from her to himself, of her dower interest in the land in controversy. And to avoid this unpleasant duty the deed was alleged to have been procured under the following circumstances. *Record, page 2, folios 3-4.*

"That while your oratrix was so seized of said estate in dower of said land, she was informed that the same were about to be involved in litigation, and having little or no knowledge of business, and being averse to having her name complicated in any lawsuits or controversy, and depending upon the ability and integrity of her son, said defendant, Samuel J. Jones, to conduct any business and defend any lawsuits that might arise out of the ownership of said interest in said lands, and merely for the purpose of facilitating the management and transaction of such business, and the conduct of said contemplated litigation, and the better to protect her said interest in said lands, and not with any intentiou to part with or divest herself of her interest or estate in said lands or any part thereof, she did on the 30th day of January, 1866, at the request of the said defendant, Samuel J. Jones, and for the purpose aforesaid and not other, execute, acknowledge and deliver to said Samuel J. Jones, a quit-claim deed of her said dower interest in said lands, in which deed there was expressed a consideration of one dollar, but your oratrix avers that she never received said consideration or any consideration for said deed or lands from said grantee or from any other person; and your oratrix further avers that said grantee took and accepted said deed under the express understanding and agreement to and with your oratrix, that he was to receive the same from your oratrix to enable him to better conduct any business for your oratrix, that might arise concerning said lands, but not in any way to acquire any estate in the dower interest of your oratrix therein, and it has ever since said deed been known and understood by and between said dedefendant, Samuel J. Jones, and your oratrix, that he

held said deed for the purposes aforesaid; and for said purposes only, and for no other purposes whatever."

It was objected to the original bill, that the deed was voluntarily executed, and a parol trust in favor of the grantor was endeavored to be raised under it, which was contrary to the statutes of Minnesota on uses and trusts, and consequently void, and that their being no fraud alleged, the deed would have to stand for what it purported on its face to be.

The court adopted this view of the case, and sustained the demurrer, giving as its reasons that "The statute of frauds and the rules of evidence will not permit a deed absolute on its face, to be changed into one of trust, by parol unless there be *fraud*, accident or mistake;" at the same time holding that "the defendant stands in no better position than the son of the complainant." *See opinion, page 17, of Record.*

The complainant's solicitors accepted this view of the court, knowing that in fact the quit-claim deed was obtained by fraud from the complainant, and that the defendant, Matilda A. Van Doren, and her former husband, knew all about it when the mortgage was given by Samuel J. Jones to them; and feeling assured that a new bill alleging the fraud, and the knowledge of it by the Van Dorens, would render it impregnable, and satisfy the objection of the court, framed the amended bill under the permission of the court, which bill is found in the Record on *pages 19 to 27.*

In the accended bill the manner in which the quit-claim was obtained by defendant, Samuel J. Jones, from the complainant is set out as follows:

"That while your oratrix was so seized of said estate of dower in said lands, she was informed that

the same were about to be involved in litigation by parties who disputed the title of her husband to the same, and also that the other parties owning the said three-fourths undivided interest therein, desired to have the same partitioned, and the respective shares of the said several parties set off to them in severalty, and, having little or no knowledge of business, and being averse to personal contact with business matters, she desired to empower her son, the defendant Samuel J. Jones, to appear for her and represent her in any proceeding that might involve her interests in said land, and the said Samuel J. Jones was willing to aid her in this respect.

That the said Samuel J. Jones prepared or caused to be prepared, an instrument in writing and brought the same to your oratrix and falsely represented to her that the same was a mere power of attorney to be executed by her for the purpose of empowering him to appear for her and represent her in any matter concerning her interest in said land as her attorney in fact. That your oratrix relied upon said representations and assurances and believed the same to be true. And so relying and believing, executed said instrument without reading the same; and she avers that had she read the same she was then so ignorant of business matters, that she would not have been able to determine the character or legal import of said paper. She further avers that in executing the same she had no intention whatever of parting with her interest in said land or any part thereof, and had she not fully and implicitly believed said paper so executed by her to be a mere power of attorney for the purposes aforesaid, she would not have signed the same; and that in so signing the same she was deceived and

mistaken as to the character of said instrument, and did not know its true character and legal effect, and believed it to be a mere power of attorney as aforesaid, and that she has, always, up to a very short time, to wit, less than six months before the time of filing this her bill, believed the said paper was a mere power of attorney for the purposes aforesaid, and nothing more or different.

Your oratrix further says, that as to whether the said Samuel J. Jones at the time he made said false representations to her concerning the character and legal import of said paper so executed by her as aforesaid, knew the true nature and character of said paper, and intentionally made said representations with the purpose of defrauding and deceiving her, she has no positive knowledge, but she believes he was aware of the real character of said instrument, and did purposely make said representations to defraud and deceive your oratrix, and she charges such to be the fact."

Here we have full allegations of fraud practiced on the complainant by the defendant Samuel J. Jones in the procuring of the quit-claim deed from her. The allegations are followed by others that the defendant Matilda A. Van Doren and her husband both knew of the fraud by which the deed was obtained at the time they loaned the money to Samuel J. Jones and took the mortgage to secure the same, and always afterwards knew of the same.

Can there be any doubt that if the suit had been between the complainant and her son to set aside this deed as fraudulently obtained, that she could have maintained her action? We see no difficulty in the way, and the court in its opinion on the demurrer

to the original bill expressly says that it could have been maintained had the allegations of fraud or mistake been sufficient, and also that the defendant Matilda A. Van Doren stands in no better position than the son; *page 17*. Of course all parties cognizant of a fraud stand on the same footing. It was solely on the absence of proper allegations of fraud or mistake that the court sustained the demurrer to the original bill, and it was for the purpose of allowing the complainant to supply these allegations that the amendment was allowed, and being fully supplied, the demurrer should have been overruled and the bill sustained.

It is useless to cite authorities to this court to prove that fraud is a ground for equitable interference. Fraud and mistake are the broadest and most universal foundations of equity jurisdiction.

We find it very difficult to understand upon what grounds the court based its decision in sustaining the demurrer to the amended bill. The demurrer is found on *page 27* of the record, and is based upon two grounds. 1st. That the bill does not state a cause of action entitling the complainant to relief in equity; and 2nd that the statute of limitations has run against the complainant's action.

The opinion is found on *pages 31-32*.

The court seems to ignore the right of the complainant to redeem from the mortgage, and decides the whole case upon the theory that she could only get her dower-right under any circumstances. The opinion is short, and a single reading of it shows that the judge was governed entirely by this view.

Now was this view sound? We think not.

Jones on Mortgages, § *1067*, lays down the rule that a doweress may redeem from a mortgage, even when she has joined in the mortgage, for the release of her dower.

Henry's Case, *14 Pick. 98*.

The right of a mortgagee under a mortgage is simply to get his money back with interest and costs. The land covered by the mortgage stands as security for the money loaned. He may sell it by foreclosure of the mortgage, and may buy it at the sale in discharge of his debt; but any one having an interest in the land may redeem it from the sale by paying up the debt, with interest and costs.

In commencing his action to foreclose his mortgage, he must make all parties interested in the land parties defendant in the suit if he wants to bar their right to redeem; and if he fails so to do, any party interested may file a bill to redeem at any time before he is cut off by lapse of time.

As to those who may redeem, see *2 Story's Eq. Jur.* § *1023*.

The author says: "As to the right of redemption. From what has already been stated, it is clear that the equity of redemption is not only a subsisting estate, and interest in the lands in the hands of the heirs, devisees, assigns, and representatives (strictly so-called) of the mortgagor, but it is also in the hands of any other persons who have acquired any interest in the lands mortgaged by operation of law or otherwise, in privity of title. Such persons have a clear right to disengage the property from all incumbrances, in order to make their own claims beneficial or available. Hence a tenant for life, a tenant by the courtesy, a

jointress, a tenant in dower in some cases, a reversioner, a remainder-man, a judgment creditor, a tenant by elegit, the lord of the manor holding by escheat, and indeed every other person being an incumbrancer, or having a legal or equitable title or lien therein, may insist upon a redemption of the mortgage, in order to the due enforcement of their claims and interests respectively in the land."

Now how does the complainant stand under the admitted allegations of the bill? She had a dower estate in an undivided one-quarter of certain lands of which her husband died seized. Her son who held the fee of these lands by descent, obtained from her by fraud a deed of her dower right. He then colluded with the Van Dorens, who knew of the fraud to cheat his mother out of her estate, by means of a mortgage and its foreclosure and the sale of the land. All this was accomplished and the land purchased by the defendant, Van Doren. How does this leave the complainant? Had her husband mortgaged the land either with or without her joining in the mortgage, she could have redeemed from the same. Had her son mortgaged the land after the death of her husband, she could have redeemed whether she joined in the mortgage or not. Is it to be said by those who have committed the fraud upon her, by which she ostensibly parted with her estate, but in law did not do anything of the kind, that she is in any worse position than she was before she was defrauded into executing that deed? certainly not.

Can they say that she has no standing in equity to claim her rights, when they have frandulently deprived her of a standing in a court of law by procuring from her this conveyance of her estate of dower, in the fraudu-

lent manner they admit by the demurrer they have done? She has got to get rid of this deed in order to assert her claim to dower; she can only do this in a court of equity. They have changed her claim by their fraudulent acts, from a legal one to an equitable one, and there is no more familiar principle than when a court of equity gets possession of a case for any purpose, it retains it for all purposes, and will adjust all rights between the parties.

What are her rights as a redemptioner? She cannot redeem from a part of the sale, she must redeem from the whole mortgage.

Collins vs. Riggs, 14 Wallace, 491.
Bradley vs. Snyder, 14 Ill. 263.
Benedict vs. Gilman, 4 Paige, 58.
Johnson vs. Harmon, 19 Iowa, 56.
Knowles vs. Rablin, 20 Iowa, 101.
Gage vs. Brewster, 31 N. Y. 218.
Martin vs. Fridley, 23 Minn. 13, opinion 16.

This she offers to do. *See Record, page 26, folios 49-50.* When this is done, the mortgagee, Matilda A. Van Doren, who is purchaser and defendant, will have received all the money she loaned on the mortgage, with interest, cost and expenses. She can claim no more, and the claimant will have received the land in compensation for her dower interest therein, and the money she has been compelled to pay out to redeem the same. Justice will have been done to all parties; and these defendants have been defeated in their fraudulent schemes to cut out the complainant from her rights.

The complainant was not a party to the foreclosure suit, and is, of course, not bound by it, or barred of

any rights by reason of it. In her amended bill she says, at the *top of page 25 of the Record*, as follows:

"Your oratrix further avers that she was not a party to said foreclosure suit, and did not know of the existence of said indebtedness of Samuel J. Jones, or of said trust deed, nor of said foreclosure suit, nor of any matter or thing connected therewith, until long after said suit had been terminated, and the title to said land, as far as the same could be, had passed to said purchaser, Matilda A. Van Doren, by the final decree of said court, nor until shortly before the filing of this her bill."

In the language of this court in *Collins vs. Briggs, 14 Wallace, 493.* "The party offering to redeem proceeds upon the hypothesis that as to him the mortgage has never been foreclosed, and is still in existence. Therefore he can only lift it by paying it." This is of course the case with all persons not made parties to the suit.

The plain English of the whole case is this. If we ever had a dower estate in these lands, we have not been deprived of it by the fraud perpetrated upon us. If our position has been changed from that of the holder of a legal estate in an unincumbered tract of land, to that of the holder of an equitable estate in a diminished and incumbered tract of land, by the fradulent acts of the defendants, then, as Mr. Story says, in *Section 1023, Vol. 2, Eq. Jur.:* "Such persons have a clear right to disengage the property from all incumbrances in order to make their own claim beneficial or available." And this is done by redemption, and can only be done by redemption in this case.

It may be urged by the other side that this fraudulently procured deed did not affect the right of the widow and complainant to have her dower set off to to her, because, being a fraud, it would not impair her rights, and that she could have asserted her right to her dower notwithstauding the deed; and as far as we can infer from the opinion of the court on this demurrer, the judge below was of that opinion; but certain facts alleged in the bill present a perfect and conclusive answer to this position. We show that at the judicial sale under the mortgage one Galusha purchased a portion of the mortgaged premises. *See page 24 of Record, fol. 47.* Now Mr. Galusha obtained by such purchase a valid title to the land he bought, because so far as he was concerned he was a *bona fide* purchaser for value and without notice of the fraud.

We also show that after the title became vested in the defendant Matilda A. Van Doren, and in the year 1881, she sold to one William R. Marshall, a *bona fide* purchaser, a large portion of the lands purchased by her for the sum of $10,000. *Record, p. 25, fol. 49.* This all happened before the complainant discovered the fraud which had been perpetrated on her, and was all made possible by the procuring of this deed from the complainant in the way alleged in the bill, which gave the defendant a record title to the lands and enabled her to dispose of parts of them to these *bona fide* purchasers. And after the complainant had discovered the fraud which had been practiced upon her, the estate out of which she was entitled to be endowed had been diminished by these two sales, and she was left without power to obtain restitution in any way except by redeeming the mortgage. If such question is raised, it will come with a very bad grace from those

who have by fraud deprived the widow of the possibility of having her dower assigned, to claim that she should have resorted to that remedy.

Second.

Is the complainant barred by the statute of limitations?

The bill alleges that the complainant was ignorant of all the facts constituting the fraud until long after the final decree was entered in the foreclosure suit, and up to within six months of the time of filing her bill.

The statute of Minnesota on limitations provides that an action to foreclose a mortgage shall be commenced within ten years after the cause of action accrues, and is as follows:

"SEC. 11. Every action to foreclose a mortgage on real estate shall be commenced within ten years after the cause of action accrues."

Gen. Stat. Minn. 1878, p. 708, Sec. 11.

This time was enlarged in 1887 to fifteen years.

Section six of the same statute of limitations on *page 707*, provides as follows:

"SEC. 6. Within six years."

The first five subdivisions provide for actions that must be commenced within six years after the cause of action accrues, and subdivision six is as follows:

"*Sixth.* An action for relief on the ground of fraud: the cause of action in such case not to be deemed to have accrued until the discovery by the agrieved party of the facts constituting the fraud."

The bill alleges ignorance of all the facts constituting the fraud in this case up to within six months

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CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 202.

SARAH M. JONES, APPELLANT.

vs.

MATILDA A. VAN DOREN, ET AL., RESPONDENTS.

A WORD IN REPLY TO APPELLANT'S BRIEF.

SUPREME COURT OF THE UNITED STATES.

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No. 202.

SARAH M. JONES, APPELLANT.

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A Word in Reply to Appellant's Brief.

As our brief in this case was prepared before seeing that of the appellant's, we desire to say simply a word or two in reply:

The appellant's brief is sprinkled quite freely with the charge of fraud on the part of the Van Dorens against the complainant. Counsel for the appellant has evidently confounded the allegations in the original bill with the allegations in the amended bill in this respect: The original bill does charge fraud and conspiracy on the part of the Van Dorens, but in the amended bill these charges are wholly omitted. The only fraud charged in the amended bill is that perpetrated by Samuel J. Jones upon his mother in procuring the deed from her to him of her dower interest in the property. The amended bill charges that the Van Dorens had knowledge of the alleged fraud practiced by Samuel J. Jones upon his mother in procuring the deed from her. But in respect to the mortgage executed by Samuel J. Jones to secure his indebtedness to Matilda A. Van Doren, the amended bill, instead of charging fraud against the Van Dorens, expressly states that it was not the purpose or intention that the mortgage should cover the dower interest of the complainant in the premises.

See Folio 43, Page 22, and
Folio 46, Page 24 of the printed record.

The case, however, does not hinge on any question of fraud.

The appellant's brief also attempts to make a point out of the alleged facts that at the foreclosure sale R. B. Galusha purchased a certain piece of the property, and that since then the respondent, Matilda A. Van Doren, has sold a certain piece of the property, which she purchased in at the foreclosure sale, to William R. Marshall, and that the said Galusha and Marshall were innocent bona fide purchasers for value, whereby it is claimed that complainant has lost her dower right in the tracts so purchased by the said Galusha and Marshall. Now if the complainant has lost her dower right in the pieces of property purchased by said Galusha and Marshall through any fraud or wrongful acts on the part of Matilda A. Van Doren, she can have her remedy in a proper action brought for that purpose, but not in this action. This action is for no such redress. The object, purpose and scope of this action is to enable the complainant to recover her alleged dower interest in the lands, the title to which is still held by the said respondent Matilda A. Van Doren. She seeks nothing more in this action. The action proceeds upon the theory that in order to enable her to recover her alleged dower interest in the property now held by the said Matilda A. Van Doren she must first redeem the mortgage. Herein is the great error upon which this action is based, If she has a dower interest in these lands it is of a date long anterior to the mortgage through and under which Matilda A. Van Doren acquired title to the lands. Her interest therefore, being prior to the mortgage and she being no party to the mortgage, is not in any way cut off or affected by the mortgage or its foreclosure, if as is alleged, the mortgage was taken with full notice of complainant's rights. She was therefore no proper party in the foreclosure suit. Her interests, if any, were anterior and therefore unaffected by the mortgage. It was like a case of a mortgage given by a husband in which the wife did not join; in such a case the foreclosure of the mortgage and the death of the husband would not affect the widow's right of dower, and she would not be a proper party in a suit to foreclose the mortgage nor would she have any right to redeem the mortgage. She could proceed and recover her dower interest just the same as though no mortgage had ever been given. Just so with the complainant in this action: Her interest accrued, if at all, prior to the mortgage and she was no party to that instrument, therefore her interest is unaffected by it or the foreclosure of it. She can proceed to recover her dower interest just the same as though no mortgage had been given, so far as respects the land now held by Matilda A. Van Doren, who took the mortgage, as the amended bill alleges, with full knowledge that Samuel J. Jones had no right to mortgage his mother's dower interest and did not intend to do so.

We would particularly call the attention of the court to the case

The mortgage certainly covered the interest of Samuel J. Jones in the property, and its foreclosure passed that interest to the purchasers at the foreclosure sale.

C. K. DAVIS and
J. M. GILMAN,
Solicitors for Respondent.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 202.

SARAH M. JONES, APPELLANT,

vs.

MATILDA A. VAN DOREN, SAMUEL J. JONES AND SAMUEL J. GLOVER, RESPONDENTS.

BRIEF ON BEHALF OF THE RESPONDENT, MATILDA A. VAN DOREN.

This is a bill professedly to redeem certain lands from a mortgage. The allegations of the original bill, so far as material to the presentation of the legal question sought to be raised, are briefly as follows.

The complainant, Sarah M. Jones, is the widow, and the respondent, Samuel J. Jones, is the son and only heir at law of Robert H. Jones, who died in April, 1863, intestate, and who, at the time of his death, was seized in fee of certain lands in Minnesota, whereupon his said widow, Sarah M. Jones, became entitled to dower interest in said lands, and the said Samuel J. Jones became the owner in fee of the same, subject only to the said dower interest of his mother.

The bill then alleges that on the thirtieth day of January, 18[illegible] the said Sarah M. Jones, by deed duly executed and delivered, conveyed her said interest in said real estate to the said Samuel J. Jones. But the bill alleges that the said deed was without consideration, and was merely in trust, to enable the said Samuel J. Jones to defend the title to said premises against a threatened suit attacking their title to the same, and was not intended or designed to divest her of her said dower interest. In other words, that the conveyance of her dower interest to the said Samuel J. Jones was merely the creation of an express trust, for a specified purpose.

The bill further alleges that in August, 1871, one R. B. Galusha instituted a suit against the said Samuel J. Jones and others, attacking the validity of their title to said premises, and that said suit was successfully defended and defeated by the said Samuel J. Jones

whereby the object and purpose of the trust, reposed in him by the conveyance of her said dower interest, was fully performed, but that he never reconveyed said dower interest to her, nor did she request the same to be reconveyed.

The bill further alleges that on the twenty-fifth day of July, 1871, the said Samuel J. Jones executed his promissory note for $10,000, payable in six (6) months. with interest at ten per cent (10%) per annum, to Wm. H. Van Doren, husband of the defendant, Matilda A. Van Doren, to evidence an indebtedness then due from the said Samuel J. Jones to the said Matilda A. Van Doren; and at the same time to secure said note the said Samuel J. Jones executed, acknowledged and delivered to the defendant, Samuel J. Glover, as trustee, his certain trust deed or mortgage on the said premises, of which the said Robert H. Jones died seized, including in said mortgage the said dower interest of the said Sarah M. Jones, which said note and mortgage was afterwards, and on the day of the date thereof, transferred by endorsement to the said Matilda A. Van Doren.

The bill further charges that the said Wm. H. Van Doren and Matilda A. Van Doren were all the time fully advised and informed of the trust relation between the said Samuel J. Jones and his mother, Sarah M. Jones, in respect to her said dower interest in said premises, and the object and purpose for which the same had been conveyed to the said Samuel J. Jones, and that the said trust deed or mortgage to secure said $10,000 note was in pursuance of a conspiracy between the said Wm. H. and the said Matilda A. Van Doren, and the said Samuel J. Jones, to cheat and defraud the said complainant out of her said dower interest in said premises.

The bill further charges that said mortgage was afterward foreclosed in the District Court of Ramsey County, Minnesota, and that such proceedings were had in such foreclosure suit, that on the fourteenth day of October, 1876, by and under a decree of said Court, in said suit, all the lands covered by said mortgage were sold to satisfy the same, and were also purchased and bought in by said Matilda A. Van Doren (except one small tract), and that such further proceedings were taken and had in said foreclosure suit that on the twenty-second day of May, 1880, a final decree was entered in said suit, and the title to said lands was vested in the said purchaser, and that said complainant, Sarah M. Jones, was not made a party in said foreclosure suit, and never knew of said mortgage or said foreclosure suit until long after the final termination of the suit.

The bill also alleges that the said Matilda A. Van Doren has sold and conveyed a part of said premises, but holds the title to the balance purchased by her at said foreclosure sale, and the bill demands an accounting and a decree giving her the right to redeem said premises from said mortgage.

the demurrer was sustained and the bill ordered dismissed ... ground that it was an attempt to establish an express trust by ... contrary to both the statute of frauds and the statute of uses ... trusts. But at the request of counsel for the complainant, ten ... time was allowed "in which to amend her bill of complaint." ... page 18 of Record.)

The complainant, however, instead of amending the original ... filed an entirely new bill, designating it "Amended Bill," in ... there is an entire change of base. Instead of an express trust ... charged in the original bill, the amended bill sets up a state of ... which if true would create a resulting trust; the purpose evidently ... being to get around the statute of frauds and of uses and ... which were fatal to the original bill. The amended bill also ... dons the conspiracy charge in the original bill, and alleges ... was not the design or intention that the mortgage should cover ... dower interest.

We moved to strike this "Amended Bill" from the files (see ... 30 of Record) and also demurred to the same. The demurrer ... sustained, but no definite ruling made on the motion to strike ... the files. The complainant appeals to this court from the ... dismissing the "Amended Bill." We make the following points ... behalf of the defendant, Matilda A. Van Doren.

I.

The "Amended Bill" should be stricken from the files for ... reason that the same is not in form, substance or effect an ... ment to the original bill, but a new and different cause of action ... this, to wit: that the gist of the cause of action alleged in the ... nal bill is that the plaintiff conveyed her dower interest to Samuel ... Jones for a special purpose, which made him a trustee of an ... trust, and that the property had come to the defendant ... with such trust; whereas the amended bill charges that Samuel ... Jones procured the conveyance from her by fraud, which ... would create in him a resulting trust by operation of law. Further ... more, the original bill charged a conspiracy to defraud her ... her dower interest in the giving and foreclosure of the mortgage, ... whereas the amended bill charges that it was not the intention ... have the mortgage cover or embrace her dower interest.

A party cannot, under the privilege of amending, introduce ... matter which would constitute a new bill.

Snead vs. McCoull, 12 How. 407.
Shields vs. Barrow, 17 How. 130.
Pratt vs. Bacon, 10 Pick. 123.
Platt vs. Squire, 5 Cush. 551.
Verplank vs. Ins. Co., 1 Ewd. Ch. 46.
Crabb vs. Thomas, 25 Ala. 212.

Cary vs. Smith, 11 Ga. 539.
Goodyear vs. Bowen, 3 Blatch. 266

II.

The amended bill makes no case entitling the complainant to any relief. The only interest she claims in the property is that of dower, and by virtue of that interest she seeks to redeem the mortgage upon the theory that it is necessary to do so in order to secure her dower interest. She expects that an accounting would show that the defendant, Matilda A. Van Doren has realized from a sale of a part of the property, more than enough to satisfy the mortgage, so that there would be nothing to pay, and that a decree declaring the mortgage satisfied, irrespective of the foreclosure, would leave the balance of the property to inure to that dutiful son, Samuel J. Jones.

The mortgage and foreclosure proceedings were regular, legal and valid so far as respects the interests of Samuel J. Jones in the property, and cannot be disturbed by the plaintiff. If she has a dower interest in the property, she can proceed and recover it irrespective of the mortgage or foreclosure. They do not stand in her way in the least. The interest of her husband, Robert H. Jones, was a legal, not merely an equitable interest, and she was not a party to the mortgage; and in such cases a widow need not redeem a mortgage in order to recover her dower interest, and will not be allowed to do so.

Messiter vs. Wright, 16 Pick. 151.
Davis vs. Wetherell, 13 Allen, 60.
Whitcomb vs. Southerland, 18 Ill. 578.
Opdyke vs. Bartles, 11 N. J. Eq. 133.
2 Scribner on Dower, page 151 (1st Edition.)
2 Jones on Mortgages, Section 1067.

The proposition is general and universal that where the mortgage is not binding and operative upon the widow, because she was not a party to it, or because it was obtained by fraud, or for any reason, she can have her dower regardless of the mortgage, and therefore will not be allowed to redeem the mortgage.

If a man in contemplation of marriage conveys away his land to defeat dower, or if during coverture he purchases land and takes the title in the name of third party for a like purpose, such conveyances will be subject to the wife's right of dower.

2 Scribner on Dower, 152 (1st Edition.)

And when a husband makes a deed to defraud his creditors, and without consideration, and his wife joins in the deed, she may still

claiming under him with notice.

Woodworth vs. Paige, 5 Ohio St. 70.

Upon the facts stated in the amended bill, the plaintiff could have proceeded and recovered her dower before the mortgage was given, notwithstanding her deed to her son; and Mrs. Van Doren stands in no better position, as she took the mortgage, according to the allegations of the bill, with full notice that Samuel J. Jones obtained the deed, from his mother by fraud, and without consideration. In other words, the dower right is anterior and superior to the mortgage and to all rights acquired under the same. The complainant, therefore, would not have been a proper party in the suit to foreclose the mortgage, and had she been made a party, the decree would not have barred or in any way affected her right of dower.

Lewis vs. Smith, 9 N. Y. 502.

Bank vs. Thompson, 55 N. Y. 7.

Where land of a bankrupt is sold by order of court which declares that all liens and incumbrances shall be discharged by the sale, the dower right of the wife is not thereby cut off.

Porter vs. Lazear, 109 U. S. 84.

If the mortgage or the foreclosure proceedings did in any way prejudice her dower rights, she could, in a proper suit, have the cloud or difficulty removed.

Barnes vs. Linde, 6 Allen 305.

But no such action is necessary. If she has a right of dower in the premises she seeks how to redeem from the mortgage, neither the mortgage nor the foreclosure proceedings cut off or stand in the way, or prejudice her right to a direct proceeding for the recovery of her dower.

III.

The plaintiff is barred of her dower right by sec. 4, page 70[illegible] General Statutes of Limitation of Minnesota, being the twenty year limitatian clause against the recovery of real estate. (See interpretation of this section, Seymour, Sabin & Co. vs. Carli, 31 Minn. 81.) As she bases her right to maintain the action upon her alleged right to dower in the premises, of course if she is barred of her right to recover dower she cannot maintain this action. She alleges that her husband died in April, 1863. Her right to dower, and right to recover it, then and thereupon immediately accrued, and became barred in twenty years.

Durham vs. Angler, 20 Maine, 242.

Jones vs. Parker, 6 John, Chr. 194.

Allen vs. Allen, 2 *Penn.* 311.
Conover vs. Wright, 2 *Halst., Ch.* (*N. J.*) 613.
Tuttle vs. Wilson, 10 *Ohio*, 24
Kingsberry vs. Pierce, 18 *B., Monroe* 782.
Torry vs. Minor, 1 *Smeade & M., Ch.* 489.
Gaston vs. Gaston, 2 *Rich., Eq*, (*S. C.*), 1.
2 *Scribner on Dower* 541 (1*st Edition*).

The bill alleges that plaintiff never resided in Minnesota, therefore she could never have been "seized or possessed" of the land, as required by the statute. It is also held that where the right of dower is not embraced in the statute of limitations, a Court of Equity, will, by analogy to the statute, refuse relief where a party has slept upon her dower right for twenty years without claiming it.

Ralls vs. Hughs, 1 *Dana* (*Ky.*), 407.
2 *Scribner on Dower, page* 532.

Lapse of time may be taken advantage of by demurer to the bill.
Story's Eq. Pleadings, Sec. 503.

IV.

If the plaintiff ever had a right to redeem the land from the mortgage, she was barred of that right before the commencement of this action. Sec. 11, page 708 of the Statutes, provided that, "Every action to foreclose a mortgage upon real estate shall be commenced within ten years after the cause of action accrues," and it has repeatedly been held by our Supreme Court that the right to redeem and the right to foreclose a mortgage are reciprocal and commensurable, and that the right to redeem is therefore barred in ten years.

King vs. Meigher, 20 Minn. 264.
Parsons vs. Noggle, 23 Minn. 328.

The bill alleges that the note and mortgage were given July 5, 1871, payable in six months. The note, therefore, became due and the right to foreclose and to redeem accrued Jan. 25, 1872, more than ten years before the commencement of this action.

C. K. DAVIS and
J. M. GILMAN,
Solicitors for Respondent,
MATILDA A. VAN DOREN.

130-693

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 239.

THE MICHIGAN INSURANCE BANK, PLAINTIFF IN ERROR,

vs.

ANSON ELDRED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED MARCH 26, 1886.

SUPREME COURT OF THE UNITED STATES.

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1 UNITED STATES OF AMERICA, *Eastern District of Wisconsin,* } *ss:*

Circuit Court of the United States of America for the Eastern District of Wisconsin.

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the fifth day) of October, A. D. 1885—present, the Honorable Charles E. Dyer, district judge, presiding; F. H. West, marshal; Edward Kurtz, clerk—among other the following proceedings were had, to wit:

THE MICHIGAN INSURANCE BANK, Plaintiff,
vs.
ANSON ELDRED, ELISHA ELDRED, and URI BALCOM, Defendants. } At Law.

Be it remembered that heretofore, to wit, on the 11th day of May, A. D. 1872, came the above-named plaintiff, by its attorneys, Messrs. Finches, Lynde & Miller, and filed its præcipe for a summons against the above-named defendants as follows, to wit:

Præcipe for Summons.

U. S. Cir't C't, E. Dis. Wisc'n.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI BALCOM.

2 The clerk will issue summons in above cause, returnable according to law.
Debt & damages, $10,000.
Yours, &c., FINCHES, LYNDE & MILLER,
Pl't'ff's Att'ys.

May 11, 1872.

And also filed bond for costs, which is approved.

Whereupon a summons issued, returnable the first Monday in June next, as follows:

3 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the marshal of the eastern district of Wisconsin, Greeting;

You are hereby commanded to summon Anson Eldred, Elisha Eldred, & Uri Balcom to appear before the circuit court of [SEAL.] the Untied States of America for the eastern district of Wisconsin, in the seventh circuit, at the United States court-room, in the city of Milwaukee, on the first Monday of June ensuing, then and there to answer unto The Michigan Insurance

Bank in a plea of debt, to its damage ten thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said district, this eleventh day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

EDWARD KURTZ, *Clerk.*

FINCHES, LYNDE & MILLER, *Attorneys.*

4 [Endorsed:] 249. Law docket C. The Michigan Insurance Bank *vs.* Anson Eldred, Elisha Eldred, Uri Balcom. Summons. Damages, $10,000. Filed June 3rd, 1872. Edw. Kurtz, clerk.

5 *Summons Returned.*

"Served on the within-named Anson Eldred by leaving a copy of this summons at his usual place of abode in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this third day of June, A. D. 1872. The within-named Elisha Eldred & Uri Balcom not found.

C. S. HAMILTON, *Marshal,*
By C. H. HAMILTON, *Deputy.*"

Fees, $2.66.

May 23, 1874.—This day came the plaintiff, by its attorneys, and filed its complaint, as follows:

Complaint.

U. S. Circuit Court, Eastern District of Wisconsin.

THE MICHIGAN INSURANCE BANK, Plaintiff,
against
ANSON ELDRED, URI BALCOM, & ELISHA ELDRED, Defendants.

Said plaintiff, by Finches, Lynde & Miller, its attorneys, complains and alleges that at the time of the commencement of this suit the said plaintiff was a corporation created and organized under the laws of the State of Michigan, and that the said defendant,
6 Anson Eldred, was at the same time a citizen and resident of the State of Wisconsin; that the said defendants, Uri Balcom and Elisha Eldred, at the time of the commencement of this suit were not and are not residents of the State of Wisconsin, and were not and never have been served with process in this suit, and have not, either by themselves or their attorneys, appeared in this suit.

And said plaintiff alleges that heretofore, to wit, on the fourteenth day of August, A. D. 1861, the said plaintiff impleaded the said defendant, Anson Eldred, with said defendants, Uri Balcom and Elisha

Eldred, as defendants in a suit commenced by it, said plaintiff, in the circuit court in and for the county of Wayne, in the State of Michigan, and which suit was commenced by process of attachment; that neither the said Anson Eldred, Uri Balcom, or Elisha Eldred were personally served with process in the said suit; but that afterwards, to wit, on or about the 27th day of December, 1861, the said defendant, Anson Eldred, by his attorney-, Messrs. Walker & Kent, appeared in the said suit and filed a plea of the general issue, with notice of set-off, to the declaration of plaintiff therein; and that such proceedings were then and there had in the said suit that the
7 said plaintiff, on the 13th day of May, A. D. 1862, duly recovered a judgment in form against all of the said named parties, to wit, Anson Eldred, Uri Balcom, and Elisha Eldred, in the sum of four thousand two hundred and eleven dollars and fifty-six cents damages and costs.

And said plaintiff alleges that the said Uri Balcom and Elisha Eldred were not personally served with process in said suit and did not, by themselves or their attorneys, appear in said suit.

And said plaintiff alleges that the said circuit court of Wayne county, Michigan, is a court of general jurisdiction and had full and complete jurisdiction of the subject-matter of said suit and of the person of the said defendant, Anson Eldred.

And said plaintiff alleges that the said judgment has not been paid, and that there is now due and owing on the said judgment the said sum of four thousand two hundred and eleven dollars and fifty-six cents, and the interest on the same from the thirteenth day of May, A. D. 1862, at the rate of seven per centum per annum.

Wherefore said plaintiff demands judgment for said sum of four thousand two hundred and eleven dollars and fifty-six cents,
8 and the interest on the same from the thirteenth day of May, 1862, at the rate of seven per centum per annum, & the costs of this action.

FINCHES, LYNDE & MILLER,
Pl'ff's Att'ys.

June 11, 1874.—This day came the defendant, Anson Eldred, by his attorneys, Messrs. Cottrill & Cary, and filed his answer as follows:

Answer.

Circuit Court of the United States, Eastern District of Wisconsin.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, Impleaded with URI BALCOM and ELISHA ELDRED.

And now comes the said defendant, Anson Eldred, by Cottrill & Cary, his attorneys, and, answering the plaintiff's complaint in the above-entitled action, denies each and every allegation in said complaint contained.

And, for a second and further defence, said defendant alleges that the cause of action stated in said complaint did not accrue within ten years before the commencement of this action.

9 COTTRILL & CARY,
Attorneys for Def't, Anson Eldred.

June 1, 1875.—This day came the parties, by their counsel, Mr. H. M. Finch appearing for the plaintiff and Messrs. Cottrill & Cary for the defendant, Anson Eldred, and the issue herein between the plaintiff and said defendant came on to be tried.

Whereupon a jury was called to try the same, who came, to wit, George Grimshaw, Henry R. Freeman, Alexander T. Wilson, Thomas J. Freeman, John Doe, Richard Roe, George Lawrence, Harlow Bolton, L. H. Sheppard, Benton Hinkley, Erastus Keach, and John Bonnell, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to-morrow morning.

June 2, 1875.—This day came the parties, by their counsel, and the trial of the issue herein between the plaintiff and the defendant, Anson Eldred, was resumed.

And the jurors of the jury aforesaid, being charged by the court on their said oaths, respectively, do say that they find the issue herein in favor of the said defendant.

And came the plaintiff's counsel and moved the court for a new trial for reasons filed, as follows:

10 U. S. Circuit Court, Eastern Dist. of Wisc'n.

THE MICHIGAN INSURANCE BANK *against* ANSON ELDRED *et als.*

And now comes the said plaintiff, by Finches, Lynde & Miller, its attorneys, and moves the court now here to set aside the verdict in this cause as contrary to law and against the evidence.

FINCHES, LYNDE & MILLER,
Pl'ff's Att'ys.

June 24, 1875.—This day came the parties, by their counsel, and the motion of the plaintiff for a new trial came on to be heard and was argued by Mr. H. M. Finch for the plaintiff and by Mr. Cottrill for the defendant, Anson Eldred, when the court took time to consider of the same.

July 23, 1875.—This day came the parties, by their counsel, and, on consideration of the motion of the plaintiff's counsel for a new trial, it is ordered by the court that a new trial be, and hereby is, granted.

11 April 12, 1876.—This day came the parties, by their counsel, and by consent it is ordered by the court that this cause be, and hereby is, continued.

And now, at this same term, to wit, October term, 1885, and on the twenty-ninth day thereof, to wit, on the ninth day of November, A. D. 1885, the following proceedings were had, to wit:

Second Trial.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI BALCOM. } At Law.

This day came the parties, by their counsel, Messrs. Geo. P. Miller and B. K. Miller, Jr., appearing for the plaintiff and Messrs. A. L. Cary and J. T. Fish for the defendant, Anson Eldred, and the issue herein between the plaintiff and said defendant came on to be tried.

Whereupon a jury was called to try the same, who came, to wit, W. R. Blodgett, George W. Ogden, F. H. Magdeburg, John B. Buell, James S. Peck, H. M. Northrop, A. B. McCumber, E. G. Crandall, Frederick Herman, Andrew A. Hathaway, E. E. Ely, and Peter Wright, twelve free, honest, and lawful men of the district,
12 who were severally sworn and empannelled, and the trial not being concluded the same was adjourned until to-morrow morning.

And afterwards, to wit, on the thirtieth day of said term, to wit, on the tenth day of November, 1885, the following proceedings were had, to wit:

Verdict.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, and URI BALCOM. } At Law.

This day came the plaintiff and the defendant, Anson Eldred, by their respective counsel, and the trial of the issue herein between them was resumed.

And the jurors of the jury aforesaid, being charged by the court, on their said oaths, respectively, do say that they find the issue herein in favor of the said defendant, Anson Eldred.

And came the plaintiff's counsel and moved the court for a new trial, for reasons filed, as follows:

Motion for New Trial.

U. S. Circuit Court, Eastern District of Wisconsin.

THE MICHIGAN INSURANCE BANK, Plaintiff,
vs.
ANSON ELDRED, Impleaded with URI BALCOM and ELISHA ELDRED, Defendants.

13 Now comes the plaintiff above named, by Finches, Lynde & Miller, its attorneys, and moves the court now here to set

aside the verdict and grant a new trial because the verdict is contrary to law and against the evidence.

FINCHES, LYNDE & MILLER,
Plaintiff's Attorneys.

And afterwards, to wit, on the thirty-sixth day of said term, to wit, on the eighteenth day of November, 1885, the following proceedings were had, to wit:

Order Overruling Motion for New Trial.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI BALCOM } At Law.

This day came the parties, by their counsel, and the motion of the plaintiff for a new trial being submitted, on consideration thereof it is ordered by the court that said motion be and hereby is overruled.

Judgment.

Whereupon it is considered and adjudged by this court now here that the plaintiff take nothing by its writ, and that the defendant, Anson Eldred, do have and recover of the said plaintiff, the Michigan Insurance Bank, sixty-two dollars and sixty cents, his costs about his said defence in this behalf by him expended,
14 and that he have execution therefor.

Judgment-roll filed November 18th, A. D. 1885.

EDWARD KURTZ, *Clerk.*

Costs, $62.60.

And same day (November 18, 1885) bill of exceptions signed and filed as follows:

15 *Bill of Exceptions.*

Circuit Court of the United States, Eastern District of Wisconsin.

THE MICHIGAN INSURANCE BANK, Plaintiff,
vs.
ANSON ELDRED, ELISHA ELDRED, & URI BALCOM, Defendants.

Be it remembered that the above-entitled cause was on the 9th day of November, 1885, reached in its order upon the calendar and was called, and the parties announced themselves ready to proceed with the trial, the plaintiff appearing by Finches, Lynde & Miller, its attorneys, and the defendant, Anson Eldred, appearing by A. L. Cary, his attorney, and Messrs. Jenkins, Winkler, Fish & Smith, his counsel, and a jury of twelve good and lawful men was duly empanneled and sworn, and the trial of said cause proceeded.

The plaintiff, to maintain the issue on its part, offered in evidence a judgment of the circuit court of the county of Wayne, State of Michigan, the record and all proceedings in said action.

Which judgment and record were received in evidence and are as follows, to wit:

16 STATE OF MICHIGAN, } ss:
County of Wayne, }

The circuit court for the county of Wayne to the sheriff of the county of Wayne, Greeting:

In the name of the people of the State of Michigan you are commanded that of the goods and chattels of Anson Eldred, Elisha Eldred, and Uri. Balcom, defendants, and, for want thereof, then of their lands and tenements in your bailiwick, your cause to be made the sum of four thousand two hundred and eleven dollars and fifty-six cents, which The Michigan Insurance Bank, plaintiff, lately in the circuit court for the county of Wayne aforesaid, at the court-house, in Detroit, recovered against them for its damages which it had sustained on occasion of the non-performance of certain promises and undertakings, and also thirty-six dollars and twenty-three cents, which were awarded to the said plaintiff for its costs and charges by it about its suit in that behalf expended, whereof the said defendants stand convicted, as appears of record, and have you that money before the circuit judge for the county aforesaid, at the court-house, in the city of Detroit, on the second day of September next, then and there to render to the said plaintiff for its damages and costs aforesaid; and have you then and there this writ.

Witness the Hon. Benjamin F. H. Witherell, circuit judge, at Detroit, on the nineteenth day of June, in the year of our Lord one thousand eight hundred and sixty-two.

[L. S.] D. WALKER, *Clerk.*

17 Which was indorsed as follows:

Rec'd this execution June 20th, 1862, at 9 o'clock a. m.

MARK FLANIGAN, *Sheriff,*
By ANSON WARING,
Dep. Sheriff.

The sheriff will levy this writ on the following property and upon no other—that is to say, that certain indenture of lease dated 23rd day of January, A. D. 1850, made by Clement Lafferty to James C. Ladue & Levi E. Dolson, recorded in Wayne County Registry of Deeds, Liber 37, folios 397, 398; also the building on the lot mentioned in the said lease; also one steam-engine and two boilers; also one bark-mill, thirty-three tanners' wheels; also fifty vats, being the same property attached in this cause.

E. N. & O. B. WILLCOX,
Pl'ff's Att'ys.

STATE OF MICHIGAN, } ss:
Wayne County, }

I hereby certify and return that by virtue of the within writ I did, on the 20th day of June, A. D. 1862, levy upon the property

described in the levy hereto annexed; and I further certify and return that I advertised the same according to law, and on the 10th day of November, A. D. 1862, I was ordered by E. N. Willcox, one of pl'ff's attorneys, to discontinue said sale and return the within writ without further action.

Detroit, Dec. 10th, 1862.

MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dep. Sheriff.

[Endorsed:] No. 10515. The circuit court for the county of Wayne, Mich. Ins. Bank *vs.* Anson Eldred *et al.* *Fieri facias.* Judgment rendered May 13, 1862. Damages, $4,211.56. Costs, $36.23. *Fieri facias* and return, .38. Filed January 3rd, 1863. J. M. Dalrymple, dep. clerk. E. N. & O. B. Willcox, plaintiff's attorneys.

18 To which was attached the following:

STATE OF MICHIGAN, } ss:
Wayne County, }

By virtue of the annexed writ of *fieri facias* issued out of the circuit court for the county of Wayne and State of Michigan and to me directed, and delivered against the goods and chattels, lands and tenements, of Anson Eldred, Elisha Eldred, and Uri. Balcom, I have this 20th day of June, A. D. 1862, levied upon and taken the following property, to wit: All the right, title, and interest of Anson Eldred and Elisha Eldred, two of the within-named defendants, in and to a certain indenture of lease and the rights and privileges thereby secured, and described as follows, to wit: A certain indenture of lease bearing date the 23rd day of January, A. D. 1850, made by Clement Lafferty, of the town of Springwells, in said county, to James C. Ladue and Levi E. Dolson, which said indenture of lease is recorded in the office of the register of deeds for Wayne county, in Liber 37 of Deeds, on folios 397 & 398; also the buildings on said lot (mentioned in the said lease) of all and every kind; also one steam-engine & 2 boilers; also one bark-mill; also thirty-three tanners' wheels, and also fifty (50) vats; all of which said property was taken by me by virtue of a writ of attachment issued out of said court at the suit of the Michigan Insurance Bank and against the said defendants, Anson & Elisha Eldred and Uri. Balcom, on the 14th day of August, A. D. 1861; all of which said property is situated in the city of Detroit, Wayne county, Michigan.

Detroit, June 20th, 1862.

MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dep. Sheriff.

19 *Sheriff's Sale.*

By virtue of a writ of *fieri facias* issued out of the circuit court for the county of Wayne and State of Michigan and to me directed, and delivered against the goods and chattels, lands and tenements, of Anson Eldred, Elisha Eldred, and Uri. Balcom, I did on the 20th day of June, A. D. 1862, levy upon and take all the right, title, and interest of Anson Eldred and Elisha Eldred, two of the said defendants in said writ named, in and to a certain indenture of lease and the rights and privileges thereby secured, and described as follows, to wit: A certain indenture of lease on lot No. one of the subdivision of the Lafferty farm, bearing date the 23d day of January, A. D. 1850, made by Clement Lafferty, of the town of Springwells, in said county, to James C. Ladue and Levi R. Dolson, which said indenture of lease is recorded in the office of the register of deeds for Wayne county, in Liber 37 of Deeds, on folios 397 and 398; also the buildings on said lot mentioned in said lease of all and every kind; also one steam-engine and two boilers; also one bark-mill; also thirty-three tanners' wheels, and also fifty vats, and being in the city of Detroit, Wayne county, Michigan; all of which I shall expose for sale at public auction on the premises known as Eldred tannery, on Thursday, the 30th day of October, A. D. 1862, at 10 o'clock a. m.

Detroit, August 23rd, 1862.

MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dep. Sheriff.

E. N. & O. B. WILLCOX,
Plaintiff's Attorneys.

The above sale is postponed to Monday, 10th November, 1862, at same hour and place.

Detroit, October 30th, 1862.

MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dep. Sheriff.

The above sale is further postponed to Monday, 17th Nov., 1862, at the same hour and place.

Detroit, November 1, 1862.

MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dep. Sheriff.

20 STATE OF MICHIGAN:

In the Circuit Court for the County of Wayne.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, and URI. BALCOM.

Pleas of the circuit court of Wayne county, in the city of Detroit, in the county of Wayne and State of Michigan, on the thirteenth day of May, in the year one thousand eight hundred and sixty-two.

WAYNE COUNTY, *To wit:*

The Michigan Insurance Bank, plaintiff in this suit, puts in its place E. N. and O. B. Willcox, its attorneys, to prosecute this suit against Anson Eldred, Elisha Eldred, and Uri. Balcom in a plea of attachment.

WAYNE COUNTY, *To wit:*

Anson Eldred, Elisha Eldred, and Uri. Balcom, defendants in this suit, put in their place Walker & Kent, their attorneys, at the suit of said Michigan Insurance Bank, in the plea aforesaid.

WAYNE COUNTY, *To wit:*

Be it remembered that heretofore, to wit, at Detroit, in the county and State aforesaid, and on the fourteenth day of August, A. D. 1861, according to the form of the statute in such case made and provided, a certain writ of attachment was issued out of said court; which said writ is in the following words and figures, viz:

21 STATE OF MICHIGAN, } *ss:*
County of Wayne, }

By virtue of the annexed writ of attachment, I have this 4th day of August, A. D. 1861, seized and taken the property and effects of which the following is an inventory, it being the property mentioned in a certain indenture of lease bearing date the twenty-third day of January, A. D. 1850, made by Clement Lafferty, of the town of Springwells, in the county of Wayne and State of Michigan, to James C. Ladue & Levi E. Dolson, of a certain lot situate in the township of Springwells, county of Wayne, & known and described as all that piece or parcel of land lying and being in the town of Springwells, county of Wayne, and State of Michigan, and more particularly described as all that part of the Lafferty farm, so called, in the town of Springwells, in the subdivision thereof No. one (1), on the bank of the River Detroit, which is bounded by River road, so called, westerly by a lot formerly owned and occupied by C. Reeve and Brother, and known as lot number two (2) of said farm, and southerly by the River Detroit, easterly by the land specially referred to in said lease as the easterly boundary, which said lot is one hundred and seventy-four feet front, more or less, running back to the

channel bank of the Detroit river, with all and singular the premises therein mentioned and described, which said lease is recorded in the office of the register of deeds for the county of Wayne and State of Michigan, in Liber thirty-seven (37) of Deeds, on pages 397 & 398, and which lease was duly assigned by Ladue and Dolson to Andrew Ladue and Frances E. Eldred, which assignment is of record in the registry of deeds for said county, in Liber 56 of Deeds, folios 265 & 266, & was further assigned by said Andrew Ladue to Frances E. Eldred aforesaid, which assignment is also of record in the registry of deeds for said county of Wayne, in Liber 59 of Deeds, pages 580 & 581, with the building & appurtenances thereon, & all the fixtures & machinery of every name & nature now on said premises or in the buildings thereon.

Detroit, August 14th, 1861.

(Signed) MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dep. Sheriff.

22 STATE OF MICHIGAN, } ss:
County of Wayne, }

By virtue of the annexed writ of attachment I have this 14th day of August, A. D. 1861, seized and taken the property and effects, of which the following is an inventory, to wit: All the right, title, and interest of Anson Eldred and Elisha Eldred, two of the defendants in the annexed writ of attachment, in and to a certain indenture of lease and the rights and privileges thereby secured, described as follows, to wit: A certain indenture of lease, bearing date the 23rd day of January, A. D. 1850, made by Clement Lafferty, of the town of Springwells, in said county, to James C. Ladue and Levi E. Dolson, which said lease is recorded in the office of the register of deeds for Wayne county, in Liber 37 of Deeds, on folios 397 & 398; also the buildings on said lot of all and every kind; also 1 steam-engine & two boilers; also one bark-mill, and also thirty-three tanners' wheels, & also fifty vats.

(Signed) MARK FLANIGAN, *Sheriff*,
By ANSON WARING,
Dept. Sheriff.

We, the undersigned freeholders, residing in the county of Wayne and State of Michigan, having first been duly sworn by Anson Waring, a deputy sheriff in and for said county, to make a true appraisement of all the property seized by him by virtue of the annexed writ of attachment, do appraise the several articles or parcels of property so attached as follows:

The lease mentioned in the foregoing inventory, with all the rights and privileges thereby secured	$1,500 00
Also all the buildings of every kind on said lot	3,000 00
" 1 steam-engine	400 00
" 2 boilers	400 00
" 33 tanners' wheels	500 00

Also 1 bark-mill	10 00
" 50 vats	500 00
	$6,310 00

(Signed) JOHN FULLER,
L. E. DOLSON,
Appraisers.

23 STATE OF MICHIGAN, } ss:
Wayne County, }

Henry R. Sanger, of Detroit, in said county, being duly sworn, says that he is cashier of the Michigan Insurance Bank and makes this affidavit in behalf of the said bank, which is a corporation under and by virtue of the laws of the State of Michigan and is the plaintiff in the annexed writ herein named; that deponent knows the facts herein stated of his own knowledge; that Anson Eldred, Elisha Eldred, and Uri. Balcom, who are the defendants in the annexed writ named, are indebted to the said The Michigan Insurance Bank, the said plaintiff, the sum of six thousand seven hundred dollars, over and above all legal set-offs, and that the same is due upon contract express.

And deponent further says that he knows that the said Anson Eldred, Elisha Eldred, and Uri. Balcom, the said defendants, are not residents of this the said State of Michigan, and have not either of them resided therein for three months immediately preceding the time of making this affidavit.

(Signed) H. R. SANGER.

Sworn to and subscribed before me this 14th day of August, A. D. 1861, at Detroit, in said county.

(Signed) HENRY P. SANGER,
Notary Public, Wayne County, Michigan.

And afterwards, to wit, on the eighth day of October, A. D. 1861, a certain writ of attachment was duly filed in the office of the clerk of said court; which said writ and the return of execution thereon are in the words and figures following, to wit:

24 STATE OF MICHIGAN, } ss:
County of Wayne, }

The circuit court for the county of Wayne to the sheriff of the county of Wayne, Greeting:

In the name of the people of the State of Michigan you are commanded to attach so much of the lands, tenements, goods, chattels, moneys, and effects of the defendants, Anson Eldred, Elisha Eldred, & Uri. Balcom, not exempt from execution, wheresoever the same may be found within the county of Wayne, as will be sufficient to satisfy the demand of The Michigan Insurance Bank, plaintiff, and safely keep the same to satisfy any judgment that may be recovered by the plaintiff in this attachment.

You are also commanded to summon defendants, if to be found within this State, to appear before the circuit court for the county of Wayne, at the court-house, in the city of Detroit, on Tuesday, the third day of September, at 9 o'clock in the forenoon of said day, to answer the plaintiff; and of this writ make due return.

Witness the Honorable Benjamin F. H. Witherell, circuit judge, at the city of Detroit, this 14th day of August, in the year of our Lord one thousand eight hundred and sixty-one.

[L. S.] D. WALKER, *Clerk.*

Which was endorsed as follows:

25 STATE OF MICHIGAN, } ss:
County of Wayne, }

I do hereby return that by virtue of the within writ of attachment I have this 14th day of August, A. D. 1861, attached the following property, to wit, all the right, title, and interest of Anson Eldred & Elisha Eldred, two of the defendants in said writ of attachment, in & to a certain indenture of lease, and the rights and privileges thereby secured and described as follows, to wit, a certain indenture of lease, bearing date the 23d day of January, A. D. 1850, made by Clement Lafferty, of the town of Springwells, in said county, to James C. Ladue and Levi E. Dolson; which said indenture of lease is recorded in the office of the register of deeds for Wayne county, in Liber 37 of Deeds, on folios 397 & 398; also the buildings on the said lots (mentioned in the said lease) of all and every kind; also one steam-engine & two boilers; also one bark-mill, and also thirty-three tanners' wheels, & also fifty vats; all of which said property was appraised by John Fuller and Levi E. Dolson, two disinterested freeholders, who were by me first duly sworn to make a true appraisement thereof, and whose appraisal is in writing, signed by themselves, & herewith returned; and I do further return that, after due search and diligent inquiry, I am unable to find Anson Eldred, Elisha Eldred, and Uri. Balcom, the defendants in said attachment named in my bailiwick.

Detroit, Sept. 4th, 1861.

(Signed) MARK FLANIGAN, *Sheriff,*
By ANSON WARING,
Dept. Sheriff.

Fees, $14.73.

[Endorsed:] No. —. The circuit court for the county of Wayne. Mich. Ins. Bank *vs.* Anson Eldred *et al.* Affidavit and writ of attachment. Filed Oct. 8th, 1861. D. Walker, clerk. E. N. & O. B. Wilcox, plaintiff's att'y.

26 And afterwards, to wit, on the sixteenth day of December, A. D. 1861, a certain affidavit of publication was duly filed in the office of the clerk of said court; which said affidavit and endorsement thereon are in the words and figures following, to wit:

STATE OF MICHIGAN, } ss:
County of Wayne, }

Thomas Kearney, of the city of Detroit, in said State and county, being duly sworn, deposes and says that the annexed notice has been duly published in the Detroit Free Press, a newspaper published and circulating in said State and county, at least once in each week for six successive weeks, and that the first publication thereof was on the twenty-fifth day of September, A. D. 1861; that he is employed in the office of said newspaper, and that he knows well the fact sstated therein.

(Signed) THOMAS KEARNEY.

Sworn to & subscribed before me this sixteenth day of December, 1861, at said city & county.

WM. WALKER,
Notary Public of Wayne Co., Mich.

Attachment Notice.

Notice is hereby given that a writ of attachment was issued out of the circuit court for the county of Wayne, State of Michigan, on the 14th day of August, A. D. 1861, in favor of the Michigan Insurance Bank against Alanson Eldred, Elisha Eldred, and Uri. Balcom for the sum of six thousand seven hundred dollars ($6,700.00), and certain property of said defendants, Anson Eldred and Elisha
27 Eldred, has been attached thereunder, but said writ was not served upon either of the defendants for the reason that neither could be found in said county, and said defendants have not appeared in the suit commenced by said writ.

Dated Detroit, Sept 24th, 1861.

E. N. & O. B. WILCOX,
Plaintiff's Attorneys.

Printer's Bill.

2 folios, 7 times	$4 00
Affidavit of publication	25
	$4 25

Received payment,

——— ———.

Filed Dec. 16th, 1861.

W. H. REXFORD,
Dep. Clerk.

And afterwards, to wit, on the sixteenth day of December, A. D. 1861, the appearance of the said defendants, — by the pl'ff's attorneys, was entered on the common rule book kept in the office of the clerk of said court; which said appearance is in the words and figures following, to wit:

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI. BALCOM.

In attachment.

DECEMBER 16TH, 1861.

In this cause, on filing affidavit of due publication of notice of attachment and on motion of E. N. & O. B. Willcox, plaintiff's attorneys, it is ordered that the appearance of said defendants be, and the same is hereby, entered.

(Sig'd) E. N. & O. B. WILLCOX,
Pl'ff's Att'ys.

And afterwards, to wit, on the sixteenth day of December, A. D. 1861, a certain declaration was duly filed in the office of the clerk of said court; which said declaration is in the words and figures following, to wit:

28 STATE OF MICHIGAN, } *ss*:
County of Wayne, }

In the Circuit Court for the County of Wayne, of the Sixteenth Day of December, A. D. 1861.

The Michigan Insurance Bank, a corporation created by and doing business under the laws of the State of Michigan, plaintiff herein, by E. N. & O. B. Wilcox, its attorneys, complains of Anson Eldred, Elisha Eldred, & Uri. Balcom, defendants herein, the property of the first two of whom has been duly attached & notice of said attachment published for six successive weeks, as required by the statute in cases where there is no personal service of the writ, an affidavit of which publication is duly filed of a plea of trespass on the case upon promises, filing this declaration as commencement of suit, for that whereas the defendants, on the first day of September, A. D. 1861, at Detroit, in said county of Wayne, were indebted to the plaintiff in the sum of —— dollars for the price and value of goods then and there sold and delivered by the plaintiff to the defendants at their request; and in a like sum for the price and value of work then and there done and materials for the same provided by the plaintiff for the defendants at their request; and in a like sum for money then and there lent by the plaintiff to the defendants at their request; and in a like sum for money then and there paid by the plaintiff for the defendants at their request; and in a like sum of money then and there received by the defendants for the use of the plaintiff; and in a like sum for money then and there found
29 to be due from the defendants to the plaintiff on an account stated between them.

And thereupon the said defendants, afterwards and on the day and year aforesaid, in consideration of the premises, respectively, then and there promised the plaintiff to pay it the said several sums of

money, respectively, on request, yet the said defendants have disregarded their said promises and have not (although often requested so to do) paid any of the said sums of money or any part thereof, to the plaintiff's damage of —— dollars, and therefore it brings suit, &c.

E. N. & O. B. WILCOX,
Plaintiff's Attorneys.

To the above-named defendants:

Take notice that on the trial of the above cause the plaintiff, under the money counts, will give in evidence — certain —, copy of which given below.

——— ———,
Plaintiff's Attorneys.

Copy.

$4,000. DETROIT, *June 12th*, 1861.

Sixty days after date I promise to pay to the order of Eldred & Balcom four thousand dollars at the Michigan Insurance Bank, value received.

(Signed) F. E. ELDRED.

Endorsed: "Eldred & Balcom."

30 Which was endorsed as follows: No. —. Circuit court, county of ——. The Mich. Ins. Bank *vs.* Anson Eldred, Elisha Eldred, & Uri. Balcom. *Narr.* To the within-named defendant: Take notice that on filing a declaration in this cause (of which the within is a true copy) as commencement of suit a rule was entered in the book of common rules kept by the clerk of said court in his office, in ——, requiring you to appear and plead to said declaration within twenty days after service on you of a copy thereof and notice of said rule or judgment, &c. Yours, &c., E. N. & O. B. Willcox, plaintiff's attorneys. Filed Dec. 16, 1861. W. H. Rexford, dep. clerk.

And afterwards, to wit, on the twenty-seventh day of December, A. D. 1861, a certain plea was duly filed in the office of the clerk of said court; which said plea and the endorsement thereon are in the words and figures following, to wit:

31 *Plea Non-Assumpsit, with Notice of Set-Off.*

The Circuit Court for the County of ——.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI. BALCOM.

And the said Anson Eldred, one of the defendants in this suit, by Walker & Kent, his attorneys, comes and demands a trial of the matters set forth in the plaintiff's declaration.

WALKER & KENT,
Att'ys for Anson Eldred.

Please to take notice that the said defendants on the trial of the above cause will insist upon and give in evidence under the general issue above pleaded that the said plaintiff, at the time of the commencement of the action aforesaid against the said defendants, was and still is indebted unto the said defendants in the sum of one hundred thousand dollars, lawful money of the United States of America, for divers goods, wares, and merchandise before that time sold and delivered by the said defendants to the said plaintiff and at the special instance and request of the said plaintiff.

And the further sum of twenty thousand dollars, of like lawful money, for the work and labor, care and diligence, of the said defendants by the said defendants before that time done, performed, and bestowed in and about the business of the said plaintiff and for the said plaintiff and at the like request of the said plaintiff.

And the further sum of ten thousand dollars, of like lawful money, for so much money before that time lent and advanced by the
32 said defendants to the said plaintiff and at the like request of the said plaintiff.

And for other money by the said defendant before that time paid, laid out, and expended for the said plaintiff and at the like request of the said plaintiff.

And for other money by the said plaintiff before that time had and received to and for the use of the said defendant.

And also that the said plaintiff, before the commencement of this action, accounted, together with the said defendant, of and concerning the said demand of the said plaintiff against the said defendant, and also of and concerning divers other sums of money and accounts between the said plaintiff and the said defendant, and upon such accounting the said plaintiff was found to be in arrears and indebted to the said defendant in the further sum of five thousand dollars, of like lawful money, which the said plaintiff undertook and then and there faithfully promised the said defendants well and truly to pay unto the said defendant when the said plaintiff should be thereunto afterwards requested, which several sums of money, or so much thereof as will be sufficient for that purpose, the said defendant will set off against the demand of the said plaintiff, to be proved at the trial, and have the balance certified in — favor.

Dated the 27th day of December, 1861.

Yours, &c., WALKER & KENT,
Attorneys for Defendant, Anson Eldred.

To E. N. & O. B. Wilcox, Esqs., attorneys for plaintiff.

Endorsed as follows: No. 10515. Wayne county circuit court. Michigan Insurance Bank *vs.* Anson Eldred, Elisha Eldred, & Uri. Balcom. Walker & Kent, att'ys for Anson Eldred. Filed Dec. 27, 1861. W. H. Rexford, dep. clerk.

33 And afterwards, to wit—that is to say, at a session of the circuit court for the county of Wayne, held at the court-house, in the city of Detroit, on the twenty-second day of April, in the year one thousand eight hundred and sixty-two.

Present: Hon. B. F. H. Witherell, circuit judge.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI. BALCOM.

This cause coming on to be heard, the plea of the defendants heretofore pleaded by them is withdrawn on motion of Walker and Kent, their attorneys.

And afterwards, to wit, on the twenty-second day of April, A. D. 1862, a certain order of default of Elisha Eldred and Uri Balcom was entered on the common rule book kept in the office of the clerk of said court; which order of default is in the words and figures following, to wit:

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, and URI. BALCOM.

In attachment.

APRIL 22ND, 1862.

The declaration in this cause, after service of the writ of attachment having been filed and the appearance of said defendants having been entered, and more than twenty days having elapsed since the filing of said declaration, and said defendants,
34 Elisha Eldred and Uri Balcom, having failed to plead to said declaration or demur thereto, on motion of E. N. & O. B. Willcox, attorneys for plaintiff, ordered that the default of the said defendants, Elisha Eldred and Uri Balcom, be, and the same is hereby, entered.

(Sig'd) E. N. & O. B. WILLCOX,
Pl'ff's Att'ys.

And afterwards, to wit, on the tenth day of May, A. D. 1862, an order making the default of defendants absolute was entered on the common rule book kept in the office of the clerk of said court; which order is in the words and figures following, to wit:

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI. BALCOM.

MAY 10TH, 1862.

The default of defendants for want of appearance and plea having been heretofore entered in this cause, and more than four days in term having since elapsed and no motion having been made to set aside the same, on motion of E. N. & O. B. Willcox it is ordered that said default be, and the same is hereby, made absolute; that judgment interlocutory be entered, and that it be referred to the clerk to assess the plaintiff's damages.

(Sig'd) E. N. & O. B. WILLCOX,
Pl'ff's Att'ys.

And on this day—that is, to-day—at a session of the circuit court for the county of Wayne, held at the court-house, in the city of Detroit, on the thirteenth day of May, in the year one thousand eight hundred and sixty-two.

Present: Hon. B. F. H. Witherell, circuit judge.

35 THE MICHIGAN INSURANCE BANK

vs.

ANSON ELDRED, ELISHA ELDRED, & URI. BALCOM.

The plea of the defendant, Anson Eldred, heretofore pleaded by him having been withdrawn, and the default of the defendants, Elisha Eldred and Uri. Balcom, having been duly entered and the same having become absolute, and the damages of the said plaintiff on occasion of the premises having been duly assessed at the sum of four thousand two hundred and eleven dollars and fifty-six cents over and above their costs and charges by them about their suit in this behalf expended, therefore it is considered that said plaintiffs do recover against said defendants their damages aforesaid, together with their costs aforesaid, to be taxed, and that said plaintiff have execution therefor.

36 STATE OF MICHIGAN, } *ss:*
County of Wayne, }

I, Jared Patchin, clerk of the circuit court for the county of Wayne, do hereby certify that the foregoing is correctly taken and copied from the record of the proceedings of said court in said cause, and that the same has been examined and compared by me with the original of said record in this cause, and that it is a correct transcript therefrom and of the whole of such original as well as of the execution & endorsements thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Detroit, this sixth day of November, in the year one thousand eight hundred and sixty-three.

[SEAL.] JARED PATCHIN, *Clerk.*

Fees, $8.75.

STATE OF MICHIGAN, } *ss:*
Wayne County, }

I, B. F. H. Witherell, sole judge of the circuit court for the county of Wayne, being in the third judicial circuit for the State of Michigan, do hereby certify that the foregoing attestation of record is in due form and according to law, and that I am well acquainted with the handwriting of Jared Patchin, clerk of said court, and that the signature of the said clerk signed to said attestation of record is in his proper handwriting and is his genuine signature, and that he is the clerk of said court, and that said court is a court of record, and that the seal affixed to said attestation of record is the seal of the said circuit court.

In witness whereof I have hereunto set my hand this sixth day of November, 1863.

B. F. H. WITHERELL,
Circuit Judge for the County of Wayne,
Being in the Third Judicial Circuit for the State of Michigan.

[5c. inter. revenue stamp.]

37 Which was endorsed as follows: State of Michigan. The circuit court for the county of Wayne. The Michigan Insurance Bank *vs.* Anson Eldred, Elisha Eldred, & Uri. Balcom. Certified copy of judgment record.

38 The plaintiff, further to maintain the issue on its part, offered in evidence the precipe in the case at bar and the summons and the endorsements thereon.

Which precipe was received in evidence and was as follows, to wit:

U. S. Cir. C't, E. Dist. Wis.

THE MICHIGAN INSURANCE BANK
vs.
ANSON ELDRED, ELISHA ELDRED, & URI BALCOM.

The clerk will issue summons in above cause, returnable according to law.

Debt; damages, $10,000.

Yours, &c., FINCHES, LYNDE & MILLER,
Plaintiff's Att'ys.

May 11, 1872.

Endorsed: 249. Law docket C. U. S. cir. c't, E. dist. Wis. The Michigan Ins. Bank *vs.* Anson Eldred *et al.* Precipe. Filed May 11, 1872.

Which summons and endorsements thereon were received in evidence and were as follows, to wit:

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the marshal of the eastern district of Wisconsin, Greeting:

You are hereby commanded to summon Anson Eldred, Elisha Eldred, & Uri Balcom to appear before the circuit court of the United States of America for the eastern district of Wisconsin,
39 in the seventh circuit, at the United States court-room, in the city of Milwaukee, on the first Monday of June ensuing, then and there to answer unto the Michigan Insurance Bank in a plea of debt, to its damage ten thousand dollars, which shall there and here be made to appear; and of this writ make due return.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said dis-

trict, this eleventh day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

{Seal of the United States Circuit Court, Eastern District of Wisconsin.}

EDWARD KURTZ, *Clerk.*

FINCHES, LYNDE & MILLER, *Attorneys.*

Endorsed: 249. Law docket C. The Michigan Insurance Bank *vs.* Anson Eldred, Elisha Eldred, & Uri Balcom. Summons. Damages, $10,000. Filed June 3rd, 1872. Edward Kurtz, clerk.

Served on the within-named Anson Eldred by leaving a copy of this summons at his usual place of abode, in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this third day of June, A. D. 1872; the within-named Elisha Eldred & Uri Balcom not found.

C. S. HAMILTON, *Marshal,*
By C. H. HAMILTON, *Deputy.*

Service	$2 00
Copy	60
Travel	06
	2 86

Thereupon the plaintiff rested its case.

The defendant, Anson Eldred, by his counsel, moves the court to direct a verdict for the defendant, Anson Eldred, and against the plaintiff for the reason that it appears by the evidence adduced by the plaintiff that the suit at bar was not commenced within ten years after the recovery of the judgment; which motion was thereupon argued by the counsel for the respective parties, and the court thereupon decided the said motion in the following language:

COURT: I have considered the question upon which this case of the Michigan Insurance Bank against Anson Eldred turns as carefully as possible, and, notwithstanding the very interesting argument made by Mr. Miller yesterday afternoon, I have been unable to come to any other conclusion than such as was indicated on the argument. It seems to me that section 27 of chap. 138 of the Rev. Stat. Wis. of 1858, which is declaratory of what shall constitute the commencement of a suit, is so far part and parcel of the body of the statute of limitations that it must be considered as standing in connection *in pari materia*, so to speak, with the preceding section 16, which prescribes the period within which the suit shall be commenced. The whole statute on the subject of limitations is embodied in this chapter, which begins by providing that civil actions shall be commenced within the periods therein prescribed. The section which prescribes the period within which a suit on a judgment shall be brought declares that such suit shall be commenced within ten

years; then follows section 27, which declares that an action shall be deemed commenced when the summons is served on the party, and that an attempt to commence an action
41 shall be regarded as equivalent to its commencement within the meaning of the act when the process shall be delivered to the officer with intent that it shall be served. The attempt must be made by placing the process in the hands of the officer within the ten years, and the various provisions on the subject must be considered and interpreted in conjunction with each other, and together they form the statute of limitations, which the Supreme Court, in Leffingwell *vs.* Warren, 2 Black, and in various other cases decided since Leffingwell *vs.* Warren, have held to be applicable, and must be recognized and enforced in the Federal courts. In that respect it has been quite impossible for me to make a distinction between the case at bar as here presented and the case of Leffingwell *vs.* Warren. If the statute under consideration in that case had provided not only that a suit or proceeding for the recovery of land sold for taxes must be brought within three years, but also that such an action should be deemed commenced when the process should be served upon the party, and that an attempt to commence the action should be deemed equivalent to the commencement thereof when the process should be placed in the hands of the officer with intent that it should be served, so that those provisions would stand in connection with each other just as here secs. 16 and 17 stand in chap. 138 of the revision of 1858, can there be any doubt that the Supreme Court would have held that the entire statute must be taken and considered together as constituting the statute of limita-
42 tions, which the courts of the United States, in the absence of legislation on the subject by Congress, must recognize as a statute enforceable in this court? As I indicated yesterday, the whole question turns upon that point. If section 27 is not to be regarded as a part of the statute of limitations to be recognized by this court, then Mr. Miller is right in his contention that the common-law rule as to what constituted the commencement of an action in 1872 would prevail. It all turns upon that point, and I am unable to perceive why this section 27 must not be regarded as a part of the preceding provision, which prescribes the period of limitation.

Thereupon the plaintiff, by its counsel, asked permission of the court that it be allowed to offer further proof and bring the summons into the hands of the marshal.

Which permission was granted by the court, and the plaintiff called BENJAMIN K. MILLER as witness, who, being duly sworn, testifies as follows:

"I am one of the attorneys for the plaintiff; reside in the city of Milwaukee, and am a member of the firm of Finches, Lynde & Miller, and have been a practicing attorney about 29 years."

The precipe for the summons hereto received in evidence was shown to the witness, and he states that it is in his handwriting.

"It was prepared by me on the day it bears date, the 11th day of May, 1872. When the precipe for a summons was filled up I gave it to the clerk of the court. The summons accompanied the bond for costs. After filing the precipe with the clerk I went immediately to the marshal's office, which was one story above the
43 clerk's office, and stated to the marshal that there was a summons in this case in the clerk's office against Anson Eldred for service. I stated this to the marshal on the same day the precipe was made out, and I entered it on our docket kept in our office. We were in the habit when we filed a precipe to go to the marshal's office and tell him. My opinion was then, as it is now, that the filing of a precipe was the commencement of the suit. I did not deem it essential that the summons should be put into the hands of the marshal in order to save the statute of limitations."

Thereupon the plaintiff called EDWARD KURTZ as a witness, who' being duly sworn, testifies as follows:

"I am the present clerk of the United States circuit and United States district courts for the eastern district of Wisconsin, and have been since 1872 and for 5 years previous thereto. On the 11th day of May, 1872, the clerk's office was on the second floor of the building and the marshal's office one story higher."

Q. State to the jury what was the custom or habit of the United States marshal in reference to calling at the clerk's office for process.

A. The marshal usually stopped at our office on his way up and down stairs and got such writs as were waiting for him. We had a box in which we usually placed them, so he could stop in, open the door, and get them and take them up.

Q. Do I understand you had a box where you placed process for the United States marshal?

A. Yes, sir; there was a box which stood on a book-case near the door.

44 Q. Do you know how long that had been the practice and custom in the clerk's office?

A. That had been the custom for years; ever since I had been in the office.

Q. Can you state what the practice was generally as to attorneys thus delivering their process to the marshal?

Which question was objected to by the defendants. Objections sustained and plaintiff excepted.

Q. What was the custom and practice in your office in 1872 as to what was done with process after it was issued by you, whether or not it was delivered by you to the attorneys or was delivered by you to the marshal?

A. Sometimes attorneys would wait until the process was issued and take it and deliver it to the marshal; sometimes we would put it in his box and the marshal would get it there.

Witness examines the summons in the case at bar and states that it is in his handwriting.

Q. Can you state when that summons was filled out by you?

A. I presume it must have been made out on the 11th of May, 1872; I know of nothing to the contrary. The mark of filing on the precipe for a summons is in my handwriting; it was filed May 11th, 1872.

Q. Do you remember what you did or what was done with this summons after it was issued by you?

A. I have no special recollection about that particular summons.

Q. What, under your usual practice and your usual course
45 of business, would you have done with this summons after it was issued?

Which question was objected to as incompetent by the defendant. Objection sustained. Exception by plaintiff.

By PLAINTIFF'S COUNSEL: I desire to show by the witness what his usual course and practice was as to the way he delivered process to the marshal. I wish to show it was his custom to place it in the box for the marshal.

By the COURT: He can show what his practice was in respect to depositing process in that box.

Q. What was your practice in reference to depositing process in that box?

A. Our practice was to put writs in that box for the marshal. It was our practice to put them there the day when the writ was issued.

Q. Will you state whether there was any rule or practice of the district or circuit courts or either of them on the 11th day of May, 1872, as to the commencing of suits to save the statute of limitations? If yea, state what the rule was.

Which question was objected to by the defendant as incompetent, irrelevant, and immaterial; which objection was sustained and plaintiff excepted.

Cross-examination:

Q. You say that you sometimes put process in this box for the marshal?

A. Yes, sir.

Q. Did you not sometimes take the process up to the mar-
46 shal's office yourselves and deliver it to him?

A. I think, perhaps, occasionally we did.

Q. You either did it personally or sent it up sometimes?

A. Yes, sir.

Q. Did you sometimes deliver the writs and summons process to the attorney in the case to take to the marshal?

A. Yes, sir.

Q. So that there was no uniform practice between your office and the marshal's office in reference to the delivery of writs and process for service, was there?

A. Well, no; I cannot say that there was, because if the attorney did not stop and take them himself we put them in this box.

Q. Would you not sometimes take them up yourself or send them up?

A. We might, perhaps, after a little time.

Q. Did not you do it sometimes?

A. We would sometimes, after waiting, perhaps. If he did not come down immediately I might, perhaps, take them up myself, but I have no particular recollection on that subject.

Q. What do you mean by "immediately"—if the marshal did not come down "immediately?"

A. If he did not come down, perhaps, within an hour or two.

Q. Would not they sometimes stay there a day or such a matter before he came down?

A. Perhaps they might.

Q. And several days, perhaps?

A. No; I hardly think they would stay there several days.

Q. You would take them up before you would let them lay there several days?

47 A. We would have been apt to; I do not say we would.

Q. You are as certain about that as the other proposition, that they did not remain there several days?

A. I hardly think it likely they would stay there several days.

Q. If you had, as a matter of fact, made out this summons several days after the precipe had been filed, would not you have tested it on the day that the precipe was filed?

A. Yes, sir.

Q. Have you any present recollection as to the exact date that you made out this summons in this case?

A. No, sir.

Q. Have you any recollection as to whether you placed this summons in the box that you have spoken of?

A. I have no special recollection at all about this summons.

Q. As to whether you placed it in the box, took it up to the marshal, or handed it to the attorney.

A. I have no special recollection as to what I did with it.

Re-examined:

Q. What was your custom as to issuing summons when precipe were filed, whether or not you issued them on the same day or waited several days before issuing them?

A. We would issue them on the same day.

Q. Do you remember of any case when you antedated your summons when they were issued — days after the precipe were filed?

A. I have no recollection of any.

Q. Have you any recollection of ever having neglected to issue the summons on the day when the precipe was filed?

A. No, sir.

48 Recross-examined:

Q. Do you pretend to testify that you have always issued process on the same day that the precipe was filed?

A. So far as I have any recollection on the subject; I have no recollection of anything to the contrary.

Q. May it not have been that you have done such a thing in the years you have been in court?

A. I suppose it may have been possible.

Q. You stated you were clerk at this time?

A. Yes, sir.

Thereupon plaintiff rested; and the above and foregoing was all the evidence introduced or offered by the respective parties, and the plaintiff, by its counsel, requested the court to instruct the jury as follows, to wit:

If the jury find from the evidence that it was the practice
49 of the marshal to call at the office of the clerk and obtain summons or other process, for the clerk on issuing process to deliver the same to marshal, and that the writ was issued in this cause and in accordance with said practice, that then and under such circumstances this was a good delivery of the writ to the marshal to save the statute of limitations.

Which instruction the court refused to give and the plaintiff excepted.

Thereupon the plaintiff, by its counsel, requested the court to instruct the jury as follows, to wit:

If the jury find from the evidence that the summons in this cause was issued prior to the expiration of the statute of limitations, to wit, on the 11th day of May, 1872, and left with the clerk to deliver the same to the marshal, and further find from the evidence that it was the practice of the clerk to deliver the summons to the marshal or for the marshal to call at the clerk's office and get summons or other process, and further find from the evidence that the summons was left with the clerk to be delivered to the marshal, *that* this was in law such a delivery of the summons to the marshal as will take this cause out of the statute of limitations.

Which instruction the court refused to give and the plaintiff excepted.

Thereupon the plaintiff, by its counsel, requested the court to instruct the jury as follows, to wit:

That to constitute a delivery of the summons to the marshal, in order to save the statute of limitations, it is not necessary to show
that there was a manual delivery of the summons to the
50 marshal. It is a sufficient delivery within the statute of limitations if the jury find from the evidence that it was the practice of the clerk to deliver process to the marshal or of the marshal to call at the office of the clerk to obtain the process, and further find from the evidence that the writ was issued on the 11th day of May, 1872, and left with the clerk, in accordance with such practice, either to be delivered to the marshal by the clerk or for the marshal to call and get it.

Which instruction the court refused to give and the plaintiff excepted.

Thereupon the plaintiff requested the court as follows, to wit:

The plaintiff asks to go to the jury on the evidence as to whether the writ was not delivered to the clerk for the purpose of delivering the same to the marshal for service.

Which the court refused to permit and the plaintiff excepted.

Thereupon the plaintiff requested the court to instruct the jury as follows, to wit:

The plaintiff asks the court to instruct the jury that the delivery of the process to marshal for serving may be inferred from the practice and course of business as to delivery of the summons by the clerk or the practice of the marshal to receive the same in the office of the clerk.

Which instruction the court refused to give and the plaintiff excepted.

Thereupon the defendant, by his counsel, moved the court
51 to direct the jury to find a verdict for the defendant, Anson Eldred, and against the plaintiff on the ground that it appeared by the evidence that the suit was not commenced within ten years after the recovery of the judgment, ten years being the period prescribed by the statute of limitations.

Which motion was objected to by the plaintiff and the objection was overruled and the plaintiff excepted, and the court granted said motion in the following language, to wit:

COURT: If the court is correct in the view it has expressed, that the decision of the question at issue must be controlled by the statute of the State in force May, 11th, 1872, then I think it is clear that there has been nothing developed in the testimony since adduced which changes the original position of the case, because, if the statute was applicable, then the adjudication of the highest court of the State, reported in 58 Wis., interpreting that statute is clearly binding upon this court. Although that decision was rendered long subsequent to the commencement of this suit, its effect is to declare the law in this State from the time the statute was passed. All there is of the testimony which has been submitted since the ruling of the court upon the principal question is that the clerk has a box in his office, or, so to speak, a pigeon-hole, where it was his practice, to some extent, to deposit writs, expecting that the marshal would call for them, and, as he testified, that it was the practice of the marshal from time to time to call and see whether there were any writs in that box for service. He does not state that the box was a
place designated by the marshal where process should be
52 deposited so as to make the deposit a delivery to the officer, but he does state further that sometimes he would deliver the writ to the marshal himself; sometimes he would deliver it to the attorneys for them to deliver personally to the marshal; and thus it appears, I think, that the evidence does not come up to the

point of establishing the fact—and the evidence is undisputed; there is nothing to submit to the jury—that this box was a place so designated and established by the marshal as to make the deposit of writs in it equivalent to the delivery personally to him. In the case cited in 58 Wis. (Sherry *vs.* Gilmore, 58 Wis., 324) the Supreme Court hold that even where a party takes all the preliminary steps required by law for acquiring jurisdiction of the party in a case where publication is required, the defendant being a non-resident of the State, still that is not sufficient to meet the requirements of this section; that there must be a delivery of the process to the officer in order to make the act an attempt to commence the suit, which is equivalent to the commencement of it. Since this case has been upon trial the court thinks it recalls the ground upon which it granted a new trial, which was that the question which has been now so thoroughly argued by Mr. Miller was not so fully presented on the former trial, in 1875, and the court had doubt whether the common-law rule as to what should constitute the commencement of an action did not prevail in this case, and it therefore thought there ought to be a further consideration of that question. The court may be wrong now and counsel for the plaintiff may be
53 right. It is a very good question upon which to take the judgment of the Supreme Court, and happily it is a case that can be taken there, because the amount involved is sufficient. I should very much like to see an adjudication of that Court upon the question. For myself I can only say I have the conviction I have expressed as to what is the law upon the point presented, and I must decide the question in accordance with that conviction.

Thereupon the court instructed the jury to return a verdict for the defendant, Anson Eldred, and against the plaintiff, The Michigan Insurance Bank, and the verdict of the jury was thereupon rendered in accordance with the instruction of the court and duly recorded.

Inasmuch as the above matters, testimony, objections, and exceptions do not appear of record the parties to above cause have caused this bill of exceptions to be prepared, and I, Charles E. Dyer, the judge before whom said cause was tried, do hereby certify that the above bill of exceptions contains all the evidence which was introduced or offered upon the trial of above cause and contains all the objections taken and exceptions taken upon said trial, and because the same do not appear of record and to make the same appear of record I have signed and sealed the same.

Milwaukee, Wisconsin, Nov. 9th, 1885.

CHAS. E. DYER, *Judge.* [SEAL.]

54 January 2, 1886.—This day came the plaintiff, by its attorneys, and filed the bond of Benjamin K. Miller and George P. Miller in the sum of three hundred dollars, conditioned that said plaintiff shall prosecute a writ of error to effect and answer all damages and costs if it fail to make good its plea; which bond is approved by the district judge and is as follows:

Bond for Costs on Writ of Error.

United States Circuit Court, Eastern District of Wisconsin.

THE MICHIGAN INSURANCE BANK, Plaintiff,
vs.
ANSON ELDRED, Defendant.

Know all men by these presents that we, Benjamin K. Miller and George P. Miller, are held and firmly bound unto Anson Eldred in the full and just sum of three hundred dollars ($300.00), to be paid to the said Anson Eldred, his attorneys, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of January, A. D. 1886.

55 Whereas in a suit pending in the United States circuit court for the eastern district of Wisconsin, which is above entitled, a judgment was rendered in favor of said defendant and against said plaintiff, which judgment dismissed the plaintiff's complaint with costs; and whereas the said plaintiff feels aggrieved thereby and is about to prosecute a writ of error in the Supreme Court of the United States to reverse the judgment aforesaid:

Now, the condition of this obligation is such that if the said plaintiff shall prosecute such writ of error to effect and answer all damages and costs if it fail to make good its said plea, then the above obligation to be void; else to remain in full force and virtue.

B. K. MILLER. [SEAL.]
GEO. P. MILLER. [SEAL.]

Sealed & delivered in presence of—
—— ——.

UNITED STATES OF AMERICA, *Milwaukee County, Wisconsin:*

Benjamin K. Miller and George P. Miller, being each duly sworn, each deposes and says for himself that he is worth three hundred dollars ($300.00) over and above all just debts and liabilities and exemptions.

B. K. MILLER.
GEO. P. MILLER.

Subscribed and sworn to before me this 2nd day of January, 1886.
BENJ. K. MILLER, JR.,
Notary Public, Milwaukee County, Wisconsin.

56 I approve the within bond and the sureties thereto.
January 2nd, 1886.

CHAS. E. DYER, *Judge.*

Whereupon a writ of error and citation issued and a copy of said writ of error lodged for the defendant in error.

56½ *Assignment of Errors.*

United States Circuit Court, Eastern District of Wisconsin.

THE MICHIGAN INSURANCE BANK, Plaintiff,

vs.

ANSON ELDRED, Defendant.

At the October term of the circuit court of the United States for the eastern district of Wisconsin, in the years 1885 and 1886, to wit, on the second day of January, A. D. 1886, in the said term, before the Hon. Charles E. Dyer, judge of said court, comes the said The Michigan Insurance Bank, by Finches, Lynde & Miller, its attorneys, and says—

That in giving judgment aforesaid there is manifest error in this, that the judgment aforesaid was given in favor of the defendant, Anson Eldred, when by the law of the land the said judgment should have been given for the plaintiff and against said defendant, and the defendant's plea of the statute of limitations should have been overruled, and the court should not have instructed the jury to return a verdict for the said defendant, but should either have submitted the issues of fact in the case to the jury and take its finding thereon or directed a verdict for the plaintiff and against said defendant.

And the said The Michigan Insurance Bank prays that the judgment aforesaid may be reversed, annulled, and altogether held for nothing, and that it may be restored to all things which it hath lost by the occasion of the said judgment.

FINCHES, LYNDE & MILLER,
Att'ys for the said The Mich. Ins. Bank, the Plaintiff Aforesaid.

[Endorsed:] U. S. circuit court, east. dist. of Wisconsin. The Michigan Insurance Bank, plaintiff, *vs.* Anson Eldred, defendant. Assignment of errors. Copy. Finches, Lynde & Miller, plaintiff's att'ys.

57 UNITED STATES OF AMERICA, } *ss:*
Eastern District of Wisconsin, }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with the originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a transcript of the record in the case of The Michigan Insurance Bank *vs.* Anson Eldred, impleaded, &c.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 25th day of January, in the year of our Lord one thou-

sand eight hundred and eighty-six, and of the Independence of the United States the 110th.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ, *Clerk.*

58 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between The Michigan Insurance Bank, plaintiff, and Anson Eldred, impleaded with Elisha Eldred & Uri Balcom, defendant, a manifest error hath happened, to the great damage of the said The Michigan Insurance Bank, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this second day of January, in the year of our Lord one thousand eight hundred and eighty-six, and of the Independence of the United States the 110th.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ,
Clerk U. S. Circuit Court, East'n Dist. of Wis.

59 The United States of America to Anson Eldred, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein The Michigan Insurance Bank is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of

Milwaukee, in said district, this second day of January, A. D. 1886, and of the Independence of the United States the 110th.

[SEAL.] CHARLES E. DYER, *Judge.*

Service of this citation is admitted this 18th day of January, A. D. 1886.

ALFRED L. CARY,
Attorney for Defendant, Anson Eldred.

Endorsed on cover: E. Wisconsin C. C. U. S. No. 239. The Michigan Insurance Bank, plaintiff in error, *vs.* Anson Eldred Filed March 26, 1886.

IN THE

Supreme Court of the United States.

THE MICHIGAN INSURANCE BANK,
Plaintiff in Error,
vs.
ANSON ELDRED,
Defendant in Error.

No. 239.

STATEMENT OF THE FACTS AND OF THE RECORD.

This is an action brought in the United States Circuit Court for the Eastern District of Wisconsin by the plaintiff in error (Transcript of Record, pages 2 and 3) upon a judgment recovered on May 13, 1862, against Anson Eldred, defendant in error, in the Circuit Court for the County of Wayne, in the State of Michigan.

The answer of defendant (Record, pages 3 and 4) was a general denial and the defense of the ten years' statute of limitations.

Upon the trial the plaintiff, to maintain the issue on its part, offered in evidence (Record, pages 7 to 19) a certified copy of the judgment which (page 19 of Record) was duly recovered and entered on May 13, 1862. The judgment and proceedings were received in evidence without

objection. The plaintiff then offered in evidence the *præcipe* in the action at bar as follows:

UNITED STATES CIRCUIT COURT—Eastern District of Wisconsin.

The Michigan Insurance Bank
against
Anson Eldred, Elisha Eldred and Uri Balcom.

The clerk will issue summons in above cause, returnable according to law.

Debt; damages $10,000.

May 11, 1872.

Yours, etc.,
FINCHES, LYNDE & MILLER,
Plaintiff's Attorneys.

Endorsed: "249 Law docket C., U. S. Circuit Court, "Eastern District of Wisconsin. The Michigan Insur- "ance Bank *vs.* Anson Eldred. *Præcipe.* Filed, May "11th, 1872.

The plaintiff then offered in evidence the summons in the action with the endorsement thereon, which was as follows:

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Marshal of the Eastern District of Wisconsin, Greeting:

You are hereby commanded to summon Anson Eldred, Elisha Eldred and Uri Balcom to appear before the Circuit Court of the United States of America for the Eastern District of Wisconsin, in the Seventh Circuit, at the United States Court Room, in the City of Milwaukee, on the first Monday of June ensuing, then and there to answer unto the Michigan Insurance Bank *in a plea of debt*, to its damage, ten thousand dollars, which shall there and here be made to appear; and of this writ make due return.

WITNESS, the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the City of Milwaukee, in said district, this eleventh day of May, in the year of our Lord One Thousand Eight Hundred and Seventy-Two, and of the Independence of the United States the ninety-sixth.

{ Seal of the United States Circuit Court, Eastern District of Wisconsin. }

EDWARD KURTZ, *Clerk.*

FINCHES, LYNDE & MILLER, *Attorneys.*

Endorsed: Served on the within-named Anson Eldred, by leaving a copy of this summons at his usual place of abode, in presence of a member of his family of suitable age and discretion, whom I informed of the contents thereof, he not being found, this third day of June, A. D. 1872; the within-named Elisha Eldred and Uri Balcom, not found. C. S. HAMILTON, *Marshal.*

It accordingly appeared that the summons was issued May 11th, 1872, and was *actually served* in season before it was returnable.

Thereupon the plaintiff rested its case.

The defendant Anson Eldred (record page 21) moved the Court upon this evidence to direct a verdict for the defendant because it appeared by the evidence adduced that the suit at bar was not commenced within ten years after the recovery of the judgment.

The Court declared its opinion that it was necessary, under the Statutes of Wisconsin, in order to stop the running of the ten years' statute of limitations to commence this suit, which could only be done by the *actual service* of the summons on the defendant or by placing the process in the hands of the officer within the ten years for service.

Thereupon the plaintiff, by permission of the Court, offered in evidence the following testimony:

Testimony of Benjamin K. Miller:

He testified: (pages 22 and 23 of Record) that he was one of the attorneys for the plaintiff and a member of the firm of Finches, Lynde & Miller, and had been a practicing attorney about twenty-nine years. The *præcipe* for

summons heretofore received in evidence was shown to witness and he testified:

"It was prepared by me on the day it bears date, the "11th day of May, 1872. When the *præcipe* for a sum- "mons was filled up I gave it to the clerk of the court. "The summons accompanied the bond for costs. After "filing the *præcipe* with the clerk, I went immediately to "the marshal's office, which was one story above the "clerk's office, and stated to the marshal that there was a "summons in this case in the clerk's office against Anson "Eldred for service. I stated this to the marshal on the "same day the *præcipe* was made out, and I entered it "on our docket kept in our office. We were in the habit "when we filed a *præcipe* to go to the marshal's office and "tell him. My opinion was then, as it is now, that the fil- "ing of a *præcipe* was the commencement of the suit. I did "not deem it essential that the summons should be put "into the hands of the marshal in order to save the statute "of limitations."

Testimony of Edward Kurtz.

Plaintiff then called Edward Kurtz, who testified that he had been the clerk of the United States Circuit and District Courts for the Eastern District of Wisconsin since 1867. On May 11th, 1872, the clerk's office was on the second floor of the building, and the marshal's office noe story higher.

Q. State to the jury what was the custom or habit of the United States marshal in reference to calling at the clerk's office for process.

A. The marshal usually stopped at our office on his way up and down stairs, and got such writs as were waiting for him. We had a box in which we usually placed them, so he could stop in, open the door, and get them and take them up.

Q. Do I understand you had a box where you placed process for the United States marshal?

A. Yes, sir; there was a box which stood on a bookcase near the door.

Q. Do you know how long that had been the practice and custom in the clerk's office?

A. That had been the custom for years; ever since I had been in the office.

Q. What was the custom and practice in your office in 1872 as to what was done with process after it was issued by you, whether or not it was delivered by you to the attorneys or was delivered by you to the marshal?

A. Sometimes attorneys would wait until the process was issued and take it and deliver it to the marshal; sometimes we would put it in his box and the marshal would get it there.

Witness examines the summons in the case at bar, and states that it is in his handwriting.

Q. Can you state when that summons was filled out by you?

A. I presume it must have been made out on the 11th of May, 1872; I know of nothing to the contrary. The mark of filing on the precipe for a summons is in my handwriting; it was filed May 11th, 1872.

Q. Do you remember what you did or what was done with this summons after it was issued by you?

A. I have no special recollection about that particular summons.

Q. What, under your usual practice and your usual course of business, would you have done with this summons after it was issued?

Which question was objected to as incompetent by the defendant. Objection sustained. Exception by plaintiff.

By Plaintiff's Counsel: I desire to show by the witness what his usual course and practice was as to the way he delivered process to the marshal. I wish to show it was his custom to place it in the box for the marshal.

By the Court: He can show what his practice was in respect to depositing process in that box.

Q. What was your practice in reference to depositing process in that box?

A. Our practice was to put writs in that box for the marshal. It was our practice to put them there the day when the writ was issued.

Q. Will you state whether there was any rule or practice of the District or Circuit Courts, or either of them, on the 11th day of May, 1872, as to the commencing of suits

to save the statute of limitations? If yea, state what the rule was.

Which question was objected to by the defendant as incompetent, irrelevant and immaterial; which objection was sustained and plaintiff excepted.

Re-examined:

Q. What was your custom as to issuing summons when precipe were filed, whether or not you issued them on the same day, or waited several days before issuing them?

A. We would issue them on the same day.

Q. Do you remember of any case when you antedated your summons when they were issued—days after the precipe were filed?

A. I have no recollection of any.

Q. Have you any recollection of ever having neglected to issue the summons on the day when the precipe was filed?

A. No, sir.

Thereupon both parties rested and the plaintiff by its counsel requested the Court to instruct the jury as follows:

Instructions requested by Plaintiff.

First. If the jury find from the evidence that it was the practice of the marshal to call at the office of the clerk and obtain summons or other process, for the clerk on issuing process to deliver the same to marshal, and that the writ was issued in this cause and in accordance with said practice, that then and under such circumstances this was a good delivery of the writ to the marshal to save the statute of limitations.

Refused by the Court and exception by plaintiff.

Second. If the jury find from the evidence that the summons in this cause was issued prior to the expiration of the statute of limitation, to-wit, on the 11th day of May, 1872, and left with the clerk to deliver the same to the marshal, and further find from the evidence that it was the practice of the clerk to deliver the summons to the marshal or for the marshal to call at the clerk's office and get summons or other process, and further find from the evidence that the summons was left with the clerk to be delivered to the marshal, that this was in law such a

delivery of the summons to the marshal as will take this cause out of the statute of limitations.

Refused by the Court and exception by plaintiff.

Third. That to constitute a delivery of the summons to the marshal, in order to save the statute of limitations, it is not necessary to show that there was a manual delivery of the summons to the marshal. It is a sufficient delivery within the statute of limitations if the jury find from the evidence that it was the practice of the clerk to deliver process to the marshal or of the marshal to call at the office of the clerk to obtain the process, and further find from the evidence that the writ was issued on the 11th day of May, 1872, and left with the clerk, in accordance with such practice, either to be delivered to the marshal by the clerk or for the marshal to call and get it.

Refused by the Court and exception by plaintiff.

Fourth. The plaintiff asks to go to the jury on the evidence as to whether the writ was not delivered to the clerk for the purpose of delivering the same to the marshal for service.

Refused by the Court and exception by plaintiff.

Fifth. The plaintiff asks the Court to instruct the jury that the delivery of process to marshal for serving may be inferred from the course of practice and business as to delivery of the summons by the clerk or the practice of the marshal to receive the same in the office of the clerk.

Refused by the Court and exception by the plaintiff.

Thereupon the jury, by direction of the Court, returned a verdict in favor of the defendant and against the plaintiff, to which ruling plaintiff excepted. To reverse this judgment the plaintiff has brought the case to this Court by writ of error.

ASSIGNMENT OF ERROR.

The Court erred when it directed a verdict in favor of the defendant, because by the uncontradicted evidence in

the case the suit was commenced by the issuance of the summons on May 11, 1872.

The Court instead of directing a verdict in favor of the defendant should have directed one in favor of the plaintiff. If, however, there was a question of fact in the case, the Court erred when it refused to give the instructions requested by the plaintiff.

ARGUMENT.

I. The modes and proceedings in suits at common law on May 11, 1872, in the Federal courts of Wisconsin, were the same as were used in the highest State courts of Wisconsin of original and general jurisdiction at the time, May 27, 1848, the Federal courts were established in Wisconsin.

The case at bar was commenced previous to the act of Congress, approved June 1, 1872, which provided that the practice, pleadings and modes of proceeding in civil cases should conform, as near as may be, to the practice, pleadings, forms and modes of proceeding existing at the time in like causes in courts of record of the State within which such Circuit Courts are held. The acts of Congress enacted previously will enlighten us as to the practice and proceedings in actions at law brought in the United States Courts.

The Act of September 29, 1789, par. 2, 1 Statutes at Large, pp. 93 and 94, provides:

"Until further provision shall be made, and except "where by this Act, or other statutes of the United States, "is otherwise provided, the forms of writs * * * and "modes of process * * in the Circuit and District "Courts in suits at common law, shall be the same in "each State respectively as are now used or allowed in the "supreme courts of the same."

The Process Act, Act of May 8th, 1792 (1st Statutes at Large, 275), provides:

"*Forms of Proceedings.* 2. The forms of writs, executions and other process, and the forms and modes of proceeding in suits in those of common law, shall be the same as are now used in the said courts respectively, in pursuance of the Act entitled 'An Act to Regulate Process, etc.' (Act of September 29th, 1789.) * * * subject, however, to such alterations and additions as the said courts respectively shall, in their discretion, deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time, by rule, to prescribe to any circuit or district court concerning the same."

The Act of March 2d, 1793 (First Statutes at Large, 333), provides:

"*Rules of Court.* 7. It shall be lawful for the several courts of the United States, from time to time, as occasion may require, to make rules and orders for their respective courts, directing the returning of writs and processes, the filing of declarations and other pleadings, the taking of rules, the entering and making up judgments by default and other matters in the vacation, *and otherwise, in a manner not repugnant to the laws of the United States, to regulate the practice of the said courts respectively, as shall be fit and necessary for the advancement of justice.* * *"

These acts of Congress, by their very terms, applied only to the then existing States, so that the practice in suits at common law in the United States courts were the same as were at the time of the approval of these Acts of Congress in use in the supreme courts of the respective States.

By the Act of May 19th, 1828 (Fourth Statutes at Large, page 278), it is provided:

"*Forms of Proceedings.* I. The forms of mesne process, and the forms and modes of proceeding in suits in the courts of the United States, held in those States admitted into the Union since Sept. 29th, 1789, in those of common law, shall be the same in each of the said States

"respectively as are now used in the highest court of "original and general jurisdiction of the same, * * * "subject, however, to such alterations and additions as the "said courts of the United States respectively shall in "their discretion deem expedient, or to such regulations "as the Supreme Court of the United States shall think "proper, from time to time, by rules, to prescribe to any "circuit or district court concerning the same."

By an Act of Congress, approved August 6th, 1846, entitled, "An Act to enable the people of Wisconsin Territory to form a constitution and State Government and for the admission of such State into the Union," 9 U. S. Statutes at Large, 57, it was provided:

"Section 4. From and after the admission of Wiscon- "sin into the Union * * * the laws of the United "States which are not locally inapplicable, shall have the "same force and effect within the State of Wisconsin as "elsewhere."

A similar Act of Congress admitting Iowa* into the Union has been construed in this Court, and it was there held that the modes of process and forms of process and proceeding in suits at common law in the United States Courts in Iowa must be the same as were used in the highest courts of the State of original and general jurisdiction (not at the time of their enactment, 1789), but when the Federal courts were established in Iowa.

Wisconsin was admitted into the Union by an Act, approved May 29th, 1848, 9 U. S. Statutes at Large, p. 233, entitled, "An act for the admission of the State of Wisconsin into the Union," and by Sections 4 to 6 of this Act, United States Courts were established in the State of Wisconsin.

The modes and proceedings in suits at common law in the United States Courts in Wisconsin must, therefore, be

* Riggs *vs.* Johnson County, 6 Wall., 166, 192.
United States *vs.* Keokuk, 6 Wall., 514.

the same as were used in the highest courts of original and general jurisdiction on May 29th, 1848, when the Federal courts were established in Wisconsin, subject, however, to alterations by Act of Congress, rules of the Supreme Court of the United States or of the United States Circuit Court. There are no Acts of Congress which have changed this law until after this suit was commenced, and neither the Supreme Court of the United States nor the Circuit Court for the District of Wisconsin made any rules to alter this general provision of law.

To discover, then, whether the suit at bar, being an action at common law, was properly commenced on May 11th, 1872, in the U. S. Circuit Court for the Eastern District of Wisconsin we must investigate whether the suit was properly commenced under the law in force in the State of Wisconsin on May 29th, 1848.

II. The common law was the law which governed the practice and procedure in the highest State courts of Wisconsin of original and general jurisdiction on May 29th, 1848.

Pursuant to the Enabling Act,* approved August 6th, 1846, the people of Wisconsin adopted a constitution, which was ratified by an act of Congress † approved May 29th, 1848, which also admitted Wisconsin into the Union.

The constitution ‡ of the State of Wisconsin makes circuit courts the highest courts of original and general jurisdiction within the State. The constitution of Wisconsin, Article 7, paragraph 8, provides:

"The circuit courts shall have original jurisdiction in "all matters, civil and criminal, within this State. * *

* 9 U. S. Statutes at Large, page 57.
† 9 U. S. Statutes at Large, page 234.
‡ The constitution of the State of Wisconsin is printed with the Revised Statutes of Wisconsin for 1878, as well as in previous compilations.

"They shall also have the power to issue writs of habeas "corpus, mandamus, injunction, quo warranto, certiorari "and all other writs necessary to carry into effect their "orders, judgments and decrees * * * *."

The constitution also contains the following provision:

"Article 14, Sec. 2. All laws now in force in the Ter- "ritory of Wisconsin which are not repugnant to this con- "stitution shall remain in force until they expire by their "own limitation, or be altered or repealed by the Legisla- "ture.

"Sec. 13. Such parts of the common law as are now "in force in the Territory of Wisconsin not inconsistent "with this constitution, shall be and continue part of the "law of this State until altered or suspended by the "Legislature."

The laws of the Territory of Wisconsin are compiled in the Revised Statutes of 1839, which show that the common law practice and procedure were in force at the time of the adoption of the constitution and continued to be in force by the terms of the constitution itself.

In re Kindling, 39 Wis., 58, Ryan, C. J., says:

"The constitution vests the judicial power of the State "in courts which it establishes or authorizes to be estab- "lished, to be held by judges whose offices it creates or "authorizes to be created. This exhausts the judicial "power. Att'y Gen. *vs.* McDonald, 3 Wis., 805; Gough *vs.* "Dorsey, 27 id., 119. But the courts of record so estab- "lished are courts proceeding according to the course of "the common law. Putnam *vs.* Sweet, 2 Pinney, 302; "Callanan *vs.* Judd, 23 Wis., 343."

The common law practice and procedure was in force in Wisconsin up to the adoption of the code* in 1856.

Blair *vs.* Cary, 9 Wis., 543,

and also many English statutes.

See Coburn *vs.* Harvey, 18 Wis., 147.

*The code was adopted by Chapter 120 of the Laws of Wisconsin for 1856.

Connecticut Mutual Life Ins. Co. *vs.* Cross, 18 Wis., 109.
Kellogg *vs.* C. & N. W. R. R. Co., 26 Wis., 272.
Brown *vs.* Kayser, 60 Wis., 7.
Spaulding *vs.* C. & N. W. R. R. Co., 30 Wis., 116 to 119.

III. At common law a suit is commenced by the issuance of the writ. When is a writ deemed to be issued?

There is no question that a suit at common law is commenced by the issuance of the writ.

Lowry *vs.* Lawrence, 1 Caines, 69.
Cheetham *vs.* Lewis, 3 Johnson, 43.
Fowler *vs.* Sharp, 15 Johnson, 323.
Burdick *vs.* Green, 18 Johnson, 14.
Jackson *vs.* Brooks, 14 Wendell, 649, 654.
Ford *vs.* Phillips, 1 Pick., 202.
Gardner *vs.* Webber, 17 Pickering, 407, 412.
Bunker *vs.* Shed, 8 Metcalf, 150, 153.
Day *vs.* Lamb, 7 Vermont, 426.
Mason *vs.* Chenly, 47 New Hampshire, 24.
Hail *vs.* Spencer, 1 Rhode Island, 17.
Johnson *vs.* Farwell, 7 Greenleaf, 370.
Ross *vs.* Luther, 4 Cow., 158.
Parker *vs.* Colcord, 2 N. H., 36.
Society *vs.* Whitcomb, Id., 227.
Seaver *vs.* Lincoln, 21 Pick., 267.
Whitaker *vs.* Turnbull, 18 N. J. Law., 172.
Feazle *vs.* Simpson, 1 Scam., 30 (Ill.).
Schroeder *vs.* Wis. & Mich. Ins. Co., 104 Ill., 71.
Cox *vs.* Cooper, 3 Ala., 256.
Int. Bank *vs.* Jenkins, 107 Ill., 291.

The date of the writ is *prima facie* evidence of when the writ was issued, but the defendant may show by proof the real date.

Lord Mansfield in Henderson *vs.* Baker, 2 Burr., 950.
Par. 315 of Angell & Ames, pages 333 and 334.
Lowry *vs.* Lawrence, 1 Caines, 69.

Gardner *vs.* Webber, 17 Pickering, 407, 412.
Bunker *vs.* Shed, 8 Metcalf, 150, 153.
Johnson *vs.* Farwell, 7 Greenleaf, 370.

A writ is sued out, issued when it is filled up, completed, with intention to have it served.

The rule in Vermont is thus stated:

"The taking out of a writ is the commencement of "an action to avoid the statute of limitations. If it be "actually taken out, it is sufficient if it was served in time "for the next Court, to which it must be made returnable."

Allen *vs.* Mann, 1 D. Chipman's Rept., 94.

"With respect to delivering the writ to an officer for "service, all that is necessary is, that it should be deliv- "ered in season to be served and returned to the Court "to which it is made returnable. If the writ is abandoned, "or if the writ is not made with an intention to have the "the same served or be pursued, it is no commencement "of a suit. * * * * * * "The issuing of the writ when the same is pursued is the "commencement of a suit, and is the time to which the "computation is to be made to ascertain whether the "statute of limitation has run on any demand."

Day *vs.* Lamb, 7 Vermont, 426.

This was announced to be the rule in a case where the writ was not delivered to sheriff, but had been retained by plaintiff's attorney or been left in the clerk's office until two months after the statute would have been a bar.

In Rhode Island the subject is thus discussed:

"Now, it is admitted that the writ in this case was "issued prior to the expiration of the six years, and, *unless* "*the actual receipt or the service of it, by the officer, be necessary* "*to constitute the commencement of the action, it was com-* "*menced within the six years.* In the ordinary acceptation "of terms, the action is certainly commenced when the "writ is *issued*, but to answer the intent of the statute, is "something more than this required? If more, what is "it? *Is it the service of the writ?* If so, it is the sheriff

"who commences the suit, and not the plaintiff. And the "ability of the sheriff to make the service may depend on "a thousand circumstances, over which neither he nor the "plaintiff may have any control; nay, even on the will of "the debtor himself, as his absence from the country. We "cannot suppose that the Legislature in any event intended "to make a man's rights dependent on such contingencies. "*Is it the receipt of the writ by the sheriff* that is required in "order to constitute the commencement of an action? If "so, its commencement may still depend on contingencies "wholly independent of the plaintiff, as the sheriff's occa- "sional absence, his sickness, or his want of official quali- "fications. *But, at any rate, why should the receipt of it by the "sheriff be required? As long as the defendant is untouched by "the precept, of what consequence is it to him whether it be in "the hand of the plaintiff or the sheriff?* How can his liabil- "ity be affected by this or that event? The truth is, that "in contemplation of law, the writ is issued on the appli- "cation of the creditor, by the sovereign power of the "State, through the instrumentality of its officers.

"*It is the State's precept or command, and is issued and the "action commenced whenever it is in the hands of the plaintiff, "or his attorney, ready to fulfill its purpose. In this view the "commencement of the action depends wholly on the will, or the "diligence of the plaintiff. If he loses his right, it is wholly "the result of his neglect. It should, however, be followed up "by such acts as show that it is a real and not a pretended "commencement of a suit.*"

Hail *vs.* Spencer, 1 Rhode Island, 17.

In July, 1888, the Supreme Court of Rhode Island reviews the authorities on this question in New York and in the New England States, and then announces the rule to be as follows:

"* * * * * * * * In this State, and "in this country generally, it has been held that the "issuing of the writ is the commencement of the suit. "* * * But when it is said that the issuing of the "writ is the commencement of the suit, it is not intended "that the mere filing up of the process, or the mere send- "ing of it to an officer, or placing of it in his hands, is "such commencement. These acts, to constitute them

"the commencement of the suit, must be accompanied "with a *bona fide, absolute and unequivocal intention to have* "*the writ served.*† * * 'It is the intention and act com- "'bined which, in fact, constitutes the institution of the "'suit.'"

Cross *vs.* Barber, 21 Chicago Legal News, 77.
Also in 38 Albany Law Journal, 271.

The rule in Massachusetts is thus declared:

"The making of the writ was *prima facie* the com- "mencement of the action. Gardner *vs.* Webber, 17 "Pick., 407. The date of the writ was, therefore, in the "first instance to be taken as the period from which the "computation of the six years was to be made. *Such writ* "*must have been made with the intention to have the same* "*seasonably served.*"

Bunker *vs.* Shed, 8 Metcalf, 150, 153.

This was the rule in cases where the writs were made and dated shortly before the expiration of the time when the claims would have been barred by the statute of limitations, but were served several days after.

Gardner *vs.* Webber, 17 Pick., 407.
Bunker *vs.* Shed, 8 Metcalf, 150.

"When a writ is made provisionally and delivered to "an officer with instructions that it is not to be served until "after a certain time or the happening of a certain event, "the action cannot be considered as commenced until the "arrival of the time, or the happening of the event."

Chief Justice Shaw in Seaver vs. Lincoln, 21 Pick., 267, 269.
Badger *vs.* Phinney, 15 Mass., 359.

The rule seems to be, in New Hampshire, that a suit is commenced when the writ is filled out and completed

† Burdick *vs.* Green, 18 Johns, 14; Vischer *vs.* Gansevoort, Id., 496; Ross *vs.* Luther, 4 Cow., 158; Society *vs.* Whitcomb, 2 N. H., 227: Johnson *vs.* Farwell, 7 Me., 370; Whitaker *vs.* Turnbull, 18 N. J. Law, 172.

with intent to have it seasonably served, even though retained in the possession of the plaintiff's attorney until after the statute would have run.

Mason *vs* Cheney, 47 N. H., 24.
Society for Propogation, etc., *vs.* Whitcomb, 2 N. H., 227.
Hardy *vs.* Corlis, 21 N. H. (1 Foster), 356.

In Mason *vs.* Cheney, *supra*, the writ was dated September 6th, and was served September 19th, and the suit would have outlawed on September 7th, and it appeared that the plaintiff's attorney made out the writ the day it was dated, but retained it in his office for two days so as to stamp it, but did not stamp it in fact until after the statute of limitation had run. The question was when the writ was issued. The lower Court asked the Supreme Court for an advisory decision.

Bellows, J., in delivering the opinion of the Court, says, page 25:

"It would seem to follow, then, that if the writ was made "before the expiration of the six years with the intent to have it "served seasonably as it then was, although wanting a stamp, it "would prevent the operation of the statute.

"If, on the other hand, it was understood not to be completed "and there was no intention to have it served until the stamp "was affixed, the suit must be regarded as commenced when the "stamp was affixed and not before."

In New Jersey the writ is sued out, that is, issued, when it is prepared and sealed with the intention of having it served.

Updyke *vs.* Ten Broeck, 32 N. J. Law, 105.
Whitaker *vs.* Turnbull, 3 Harrison (N. J.), 174.

In Updyke *vs.* Ten Broeck, *supra*, the plaintiff's attorney filled out and sealed the writ and allowed it to remain

on his table for two months and caused it to be actually served a month and a half after the statute would have run.

Held, that the writ issued when it was made out by the attorney if he intended to have it served.

In Illinois, the suit is commenced when a *præcipe* is filed and the clerk issues the summons.

Schroeder *vs.* M. & M. Ins. Co., 104, Ill., 71.
Feazle against Simpson, 1 Scam., 30.

In Schroeder *vs.* M. & M. Ins. Co., *supra*, the summons was issued by the clerk and given to plaintiff's attorney who kept it a long time before it was served.

Held, the suit was commenced when the clerk issued the summons because plaintiff's attorney intended to commence suit.

When a writ is to to considered as *sued out*, that is, issued, in New York, is well stated by Chancellor Walworth in Johnson *vs.* Brooks, 14 Wendell, 649, where he reviews all the New York authorities and then states the rule to be (page 654):

"*The suing out of the writ is undoubtedly the commence-*
"*ment of the suit; but the writ is not considered as legally sued*
"*out until it is delivered to the sheriff, with authority to him to*
"*serve it on the defendant if he can be found within his baili-*
"*wick, or is placed in his office or transmitted to him for the pur-*
"*pose of being served; although it is not absolutely necessary*
"*that it should have actually reached the hands of the sheriff,*
"*so that the defendant could have been arrested thereon before*
"*the expiration of the time limited by the statute for the com-*
"*mencement of the action.* Such was the decision of the
"Supreme Court in *Ross vs. Luther, 4 Cowen's R.*, 158, and
"in *Burdick vs. Green*, 18 *Johnson's R.*, 14. In the last case,
"Mr. Justice Platt, who delivered the opinion of the Court,
"says: 'We do not think that it is indispensably neces-
"'sary in such cases to prove an actual delivery of the writ
"'to the sheriff, provided it be shown that it was actually

"'made out and sent to the sheriff or his deputy, by mail "'or otherwise, with a *bona fide* and absolute intention of "'having it served.'"

And that is the rule if the writ be delivered to the sheriff of a county where the defendant is known not to reside.

Johnson *vs.* Brooks, 14 Wendell, 649,

So the delivery of a writ to the coroner's wife at the coroner's office in the absence of the coroner is deemed the commencement of the suit.

Bronson *vs.* Earl, 17 Johnson Rept., 53.

So a writ filled out and delivered to a messenger, with instructions to deliver same to officer upon the happening of some future event, is deemed *issued* when actually delivered to officer and not when messenger *decides* to deliver writ.

Vischer *vs.* Gansevoort, 18 Johnson Repts., 496.
Ross *vs.* Luther, 4 Cowen, 158.

The reason for this apparent exception is thus stated in Vischer *vs.* Gansevoort:

"When, therefore, the attorney issued the writ, the "intention to commence the suit was not *absolute, positive,* "and *unequivocal;* and we cannot admit, that the mes- "senger or bearer of the writ shall have it in his power to "decide whether the suit shall be commenced by any "event subsequent to the delivery of the writ to him, short "of its being actually put into the hands or left at the "office of the coroner."

In Maine the rule is the same.

In Johnson *vs.* Farwell, 7 Greenleaf, 370, the summons was dated August 9th, on which day defendant's property was attached. August 20th the suit would have

outlawed, and the summons was not served until September 21st. Held, that the writ *issued* on August 9th.

Parris, J., in delivering the opinion of the Court, says:

"* * * * * * * * * In *Bronson vs.* "*Earl*, 17 Johns., 65, it is said that it is the intention and "act combined which in fact constitutes the commence- "ment of the suit. Because a writ filled up with no "intention of service is altogether inoperative, as it may "be filled up before the cause of action commences, or be "antedated. The presumption is that the date of the writ "is the true time when the action is brought; but this pre- "sumption may always be rebutted and the true time settled "by actual proof of the fact. The date is not conclusive, "and if the writ is antedated, the defendant will be al- "lowed to show the time when it was actually issued. 6 "*Com. Dig. Temps*, G., 6; *Ballantine on Limitations*, 119, "120, 122. * * * * * * * * "* * * * So in Massachusetts the action is "considered as commenced at suing out of the writ. *Ford* "*vs. Phillips*, 1 *Pick.*, 202. So in *New York* it is not neces- "sary to show that the writ has been returned, nor even "that it was actually delivered to the sheriff, but it is suf- "ficient if it appear that the writ was made out and sent "to the sheriff or his deputy by mail or otherwise, with "an absolute and *bona fide* intention of having it served. "*Burdick vs Green*, 18 *Johns.*, 14. Suing out the writ with "a view to service is an act of legal diligence within the "the time of limitation. It shows that the party has not "slumbered the period prescribed to bar his rights. *Bal-* "*lant.*, 121. * * * Chief Justice *Kent* held that the "action is commenced at the time of suing out of the "writ, and that the good sense as well as truth on the sub- "ject concurred that the writ issues when it is delivered to "the sheriff or his deputy, or sent to either of them with "a *bona fide* intention to be served upon the defendant."

We do not think these decisions in New York and Maine differ as to the general rule from the other States. These decisions simply show what would be the *evidence* of such intention to commence a suit, and not that such

intention cannot be shown in other ways than by delivering or attempting to deliver the writ to the officer.

Schroeder *vs.* M. & M. Ins. Co., 104 Ill., 71.

IV. The case at bar was commenced on May 11, 1872, because on that day a summons was issued, sued out, with the bona fide, absolute and unequivocal intention of having the same served, and the same was in fact seasonably served, and therefore the statute of limitations has not run.

The statute of limitations in this case would have run on May 13th, 1872, but on May 11th, 1872, the summons was actually issued, with the *bona fide*, absolute and unequivocal intention of having the same served. This is a commencement of the suit under all the authorities. That the summons was issued on May 11th, 1872, was shown not only by the date of the writ itself, which would be *prima facie* evidence of that fact, but also by the uncontradicted evidence which showed that on May 11th, 1872, the plaintiff's attorney filed, with the clerk of the court, a *præcipe* for a summons, and that thereupon, on May 11th, 1872, the clerk filled out the summons, sealed and dated it, and placed it in a box in his office, where it had been the custom and practice for years to put process intended for the marshal. "The marshal usually stopped at our office on his way up and down stairs to get such writs as were waiting for him. We had the box in which we usually placed them so he could stop in, get them and take them up. Q. Do I understand that you had a box in which you placed process for the U. S. marshal? A. Yes, sir; there was a box which stood on the book-case near the door." The plaintiff's attorney not only caused the writ thus to be actually issued, but he went to the

marshal's office, which was one story higher in the same building as the clerk's office, and stated to the marshal that there was a summons in this case in the clerk's office for service. This was not only so, but the summons was in fact seasonably served. It was made returnable on the first Monday of June, and was actually served before the return day.

By the many authorities which we have cited above this uncontradicted evidence showed absolutely that the summons was issued on May 11th, 1872, so that this suit was commenced on that day, which was two days before the statute of limitations would have barred the plaintiff's claim.

V. A criticism of the rulings of the Court below shows the error relied on.

In the court below it was held (Record, pages 21 and 22) that the following portion of the Wisconsin statute of limitations must be recognized in the Federal courts:

"Section 27:* An action shall be deemed commenced "as to each defendant when the summons is served on "him. * * * * * *
"An attempt to commence an action shall be deemed "equivalent to the commencement thereof within the "meaning of this chapter, where the summons is delivered "with the intent that it shall be actually served to the "sheriff. * * * * * *
"But such an attempt must be followed by the first "publication of the summons, or the service thereof, "within sixty days."

And that by this statute as the summons in the case at bar was *actually served* on June 3, 1872, that date must be considered as the date of the *commencement of this action*,

* Section 27 of Chapter 138 of the Revised Statutes of Wisconsin for 1858.
Section 4239 of the Revised Statutes of Wisconsin for 1878 is the same.

unless the plaintiff could show that he *delivered* the summons to the marshal before May 13, 1872, when the statute would have become a bar.

The lower court erred in this decision in two particulars:

First. Because it held that Section 27 applied to process issued by Federal courts.

Up to October 11th, 1856, when a code was adopted* in Wisconsin, the common law practice and procedure was in force in that State, but by the adoption of the code the common law practice as well as all the common law forms of mesne process were abolished, and the only process by which a suit could be commenced was a summons. A suit was no longer commenced as at common law by the *issuance* of process, but by *its service*† *alone.* The adoption of the code caused many changes in other branches of the law, including the statutes of limitations, and as it would not be just to require in all instances the *actual service* of the summons to prevent the statute of limitations becoming a bar, because the defendant could prevent in many ways the actual service of the writ, Section 27, above set out, was enacted, being copied with the code, from the statutes of New York. By this section the *actual service* was not exacted if, after an attempt was made to serve the summons, the plaintiff delivered the summons to the sheriff before the statute had become a bar, with intent to have it served.

These are statutory provisions which govern the method of commencing suits under the code, and Section 27 is

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* It was adopted by Chapter 120 of the Laws of Wisconsin for 1856.

† So provided in Title 5, Section 32 of Code. It still continues to be the law in Wisconsin. Section 1, of Chapter 124 of R. S. of 1858, and Section 2629 of R. S. of 1878.

only an amelioration of the strict provisions of the code requiring *actual service* of the summons for the commencement of a suit, because that strict requirement might work injustice in connection with the statute of limitations.

Whilst the code governed in this way the commencement of suits in the State courts of Wisconsin, the old common law writs and practice and procedure were in force in the Federal courts as it had been in the State courts previous to the adoption of the code. The record (pages 1 and 2) shows the form and contents of the summons in use in the United States courts on May 11, 1872. The summons is there an order of the Court on the marshal to summon the defendant to appear before the Circuit Court of the United States * * * on the first Monday of June ensuing, then and there to answer unto the plaintiff *in a plea of debt* to its damage, ten thousand dollars, which shall then and there be made to appear. It is made returnable on the usual return day, first Monday of the month, and this difference between the two forms of practice is especially noticable in what is contained in the summons itself. Chapter 124 of Revised Statutes of 1858 shows what a code summons must contain.

Section 2. The summons shall be subscribed by the plaintiff or his attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the State to be therein specified, in which there is a postoffice, within twenty days after the service of the summons, exclusive of the day of service.

Section 3. The plaintiff shall also insert in the summons a notice in substance as follows:

1. In an action arising on contract for the recovery of

money only, that he will take judgment for a sum specified therein, if the defendant fail to answer the complaint in twenty days after the service of the summons. 2. In other actions, that if the defendant shall fail to answer the complaint within twenty days after service of the summons, the plaintiff will apply to the Court for the relief demanded in the complaint.

We have shown above that in May, 1872, the modes and proceedings in suits at common law in the Federal courts of Wisconsin were the same as were in use in the highest State courts of original and general jurisdiction at the time when the Federal courts were established in Wisconsin, which was on May 29th, 1848, long before the adoption of the code and when the old common law practice and procedure was still in force.

Thus in May, 1872, the two systems of practice and procedure existed in Wisconsin, the one in the Federal and the other in the State courts. We have also shown above that this practice and procedure in the Federal courts could only be changed* by acts of Congress or by rules adopted by the Supreme Court of the United States or by the Circuit Court itself, and that it was not changed in any of these ways. This has been the rule in this country since the Process Act of May 8th, 1792 (1 Statutes at Large, 275), which contained similar provisions. Under these laws the practice and procedure in actions at common law in the Federal courts were made the same as were in use in the highest courts of the State of original and general jurisdiction when the Federal court was established in that State, and could not thereafter be changed except by act of Congress or rule of Court and were not affected by a subsequent change in practice or procedure by the laws of

*Section 1, of the Act of May 19th, 1828 (4 Statutes at Large, 278).

the State. This is not only the plain meaning of the Process Act of 1792 and the Act of May 19th, 1828, but it has been so expressly ruled in this Court.

Wayman *vs.* Southard, 10 Wheaton 1.

Bank of U. S. *vs.* Halsted, 10 Wheaton, 51.

These decisions have never been doubted by any Federal court of this country. It was, however, early contended that the 34th Section of the Judiciary Act of 1789, Ch. 20, which adopts the statute of limitations of the State, and which provided "*that the laws of the several* "*States*, except where the constitution, treaties or statutes of "the United States shall otherwise require or provide, "*shall be regarded as rules of decision in trials at common law* "*in the Courts of the United States, in cases where they apply,*" adopted subsequent State laws as to practice and procedure. This view, however, is not sustained by the decisions of the Supreme Court of the United States.

Wayman *vs.* Southard, *supra.*

Bank of U. S. *vs.* Halsted, *supra.*

"State laws furnish rules of decision in trials at com-"mon law, in cases where they apply, which leaves it "plainly to be understood that those laws do not apply in "all cases, *and it was early decided that they do not apply to* "*the process and practice of the Federal courts.* Wayman *vs.* "Southard, 10 Wheat., 1."

Railroad Co. *vs.* Nat'l Bank, 104 U. S., 53.

To the same effect:

Beers *vs.* Haughton, 9 Peters, 361.

Duncan *vs.* Darst, 1 Howard, 301.

Homer *vs.* Brown, 16 Howard, 354.

Bains *vs.* Schooner James, 1 Baldwin, Ct. Ct. Rept., 564.

Goodyear *vs.* Providence Rubber Co., 2 Clifford, 369.

Lane *vs.* Townsend, Ware Ct. Ct. Rept., 289, 290.
Picquet *vs.* Swan, 5 Mason, 38.
Koning *vs.* Bayard, 2 Paine Ct. Ct. Rept., 257.
New England Screw Co. *vs.* Bliven, 3 Blatchford 242.
Perkins *vs.* Watertown, 5 Bissell, 322.

In *Homer vs. Brown, supra,* it appeared that the remedy by a writ of right for the recovery of corporeal hereditaments in fee simple existed in the courts of Massachusetts until it was abolished in 1840, "and it became by the "Judiciary Acts of 1789 and 1792 a remedy in the Circuit "Court for that district; any subsequent legislation of the "State abolishing it in its courts, does not extend to the "courts of the United States, because it is a matter of pro- "cess which is exclusively regulated by Acts of Congress. "Wayman *vs.* Southard, 10 Wheat., 1."

Of course, State limitation laws, in so far as they provide periods of limitation, are recognized as rules of decisions in the Federal courts by virtue of the 34th Section of the Judiciary Act.

Leffingwell *vs.* Warren, 2 Black, 603.

But they cannot in any way interfere or change the Federal practice or procedure.

We have accordingly shown that by the Process Act of 1792, and by the Act of May 19th, 1828, subsequent legislation in any State cannot change the practice and procedure of the Federal court in that State; and that this is not only the plain meaning of these statutes themselves, but is also the construction which the courts have given them. We are therefore right in asserting that no change can be made in the Federal practice or procedure by the subsequent legislative enactment found in Section 27 of Chapter 138 of Revised Statutes of 1858, which provides,

as in the code, that actions shall be commenced, to stop the running of the statute of limitations, by the *actual service* of the summons or, in case this cannot be had, by the delivery of the summons to the sheriff, which must be followed by actual service within sixty days.

Were this not so, still for another reason this Section 27 is not applicable to the Federal courts. Section 34 of the Judiciary Act of 1789 provides that the State laws shall furnish rules of decision in trials at common law "*in cases where they apply.*" When Section 27 was enacted in Wisconsin the New York code of civil procedure had been adopted in that State and by it all common law forms of mesne process had been abolished and there was thereafter one form of mesne process and that was a *summons*. After the adoption of the code suits were not commenced as at common law by the *issuance of the writ*, but only by the *service of a summons*, and Section 27, which is a part of the statute of limitations, provides "that an action shall be deemed commenced as to each "defendant when the summons is served on him and if a "failure is made in the service, then the action shall be "commenced if the summons shall be delivered to the "sheriff with intent to have it served, which must be "followed by actual service within sixty days."

It is evident that this provision of law is applicable only to a code summons because it is its *actual service* which is attempted to be limited; it is a provision explanatory and in amelioration of the provision of the code that suits can only be commenced by the *service of a summons*. It is not applicable to common law forms of mesne process because their *issuance* constitute the commencement of suits and not their *service*.

By the common law practice and procedure in force in the Federal courts of Wisconsin in May, 1872, we find many of the old common law forms of mesne process

and that suits could be commenced by the writs of replevin, attachment, *capias ad respondendum*, as well as by summons or filing a declaration. These suits were commenced by the *issuance* of the writ, and many of them could be executed without their *service*. The *service* in itself of one of these common law writs had nothing to do with the commencement of a suit. A suit would be commenced against a defendant and his body arrested by a capias, or his property attached or replevined by these other writs, before any service of the writ upon him. The commencement of the suit was not dependent, as under the code, upon the *service of the writ*, but was commenced by its *issuance alone*, therefore the amelioration of the strict letter of the law, by which a suit could be commenced within the meaning of the statute of limitations if actual service could not be had by a delivery of the summons to the officer, provided actual service is made within sixty days, is not applicable to the common law writs, which commence suits by their issuance, as no such amelioration is necessary or possible.

Second. Because, if Section 27 did have any application to process issued by Federal Courts, the undisputed evidence shows that the summons was delivered to the marshal on May 11th, 1872.

The uncontradicted evidence shows that the summons was delivered to the marshal on May 11th, 1872. The placing of the writ in a box in which it was the custom and practice to place writs for the marshal would of itself have constituted a delivery of the writ to him, but not only was that done, but on the same day the marshal was personally notified by plaintiff's attorney that this writ was waiting for him in the clerk's office for service. When the plaintiff's attorney notified the marshal that

there was a writ in this action waiting for him in the clerk's office for service, and the marshal made no objection, but acquiesced therein, it was as much an actual delivery of the writ to him as if it had been placed in his hands, or thrown upon the table before him.

Knickerbocker Life Ins. Co. *vs.* Pendleton, 115, U. S., 339, 345.
Howard *vs.* Daly, 61 N. Y., 362, 365.

Even then, if Section 27 should be held to apply to Federal process, we have complied with its provision.

VI. Conclusion.

The only conclusion we can draw from our argument is that the Court erred when it charged the jury to return a verdict in favor of the defendant, because it appeared by the uncontradicted evidence that this suit was commenced on May 11th, 1872, when the summons was *issued*, which was two days before the Statute would have become a bar. The Judge should, therefore, have directed a verdict in favor of the plaintiff, and, as this appears by the uncontradicted evidence and was the only question in the case, the judgment of the Court below should be reversed with directions to enter judgment in favor of plaintiff.

Respectfully submitted,

FINCHES, LYNDE & MILLER,
Attorneys for Plaintiffs in Error.

GEO. P. MILLER,
of Counsel.

January 24, 1887.

Office Supreme Court U. S.
FILED,
JAN 21 1889
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 989.

THE MICHIGAN INSURANCE BANK, Plaintiff in Error,

vs.

ANSON ELDRED.

In error to the Circuit Court of the United States for the Eastern District of Wisconsin.

DEFENDANT'S BRIEF.

ALFRED L. CARY,
Defendant's Attorney.

SUPREME COURT OF THE UNITED STATES.

October Term, 1888.

No. 289.

THE MICHIGAN INSURANCE BANK,
Plaintiff in Error,

vs.

ANSON ELDRED.

In error to the Circuit Court of the United States for the Eastern District of Wisconsin.

DEFENDANT'S BRIEF.

This suit was brought upon a judgment recovered in Circuit Court for Wayne County, Michigan, *May 13th, 1862.*

Præcipe for summons and bond for costs herein were filed with the clerk May 11th, 1872, and the summons bears teste the same day. (Record, folios, 2, 3 and 42.)

Summons was served by the marshal upon the defendant, Anson Eldred, *June 3d, 1872*, but the other defendants were not found or served (record, folio 5), and have never appeared.

Complaint in the usual form upon a judgment record. (Record, folios 5–8.)

Answer: 1st. General denial, and 2d. Ten years statute of limitations. (Record, folio 8.)

In June, 1875, a trial was had before the court and a jury, resulting in a verdict for the defendant; which, afterwards, on plaintiff's motion, was set aside and a new trial granted. (Record, folios 9–11.)

In November, 1885, a second trial was had, which resulted in a verdict and judgment for the defendant (record, folios 11–15), and to reverse which this writ of error was sued out.

The issue tried was whether the action had been barred by the statute.

Plaintiff's proofs, aside from the judgment record sued upon, related wholly to the time of the commencement of this action.

Mr. Miller. one of plaintiff's attorneys, testified that he prepared the præcipe for a summons on the day it bears date, viz.: May 11th, 1872, and gave it to the clerk of the court, and that after filing the præcipe with the clerk he went immediately to the marshal's office, which was one story above the clerk's office, and stated to the marshal that there was a summons in this case in the clerk's office against Anson Eldred for service. (Record, folios 42 and 43.)

The testimony of Mr. Kurtz, clerk of the court, tended to show that the clerk's office was on the second floor of the building, and marshal's office was one story higher; that the marshal usually stopped at clerk's office on his way up and down stairs and got such writs as were waiting for him; clerk had a box near the door in which he usually placed them, so that the marshal could step in and get them; that this was the practice at the time in question and had been for years, so long as he had been in the office. His testimony, and especially that given upon cross examination, further tended to show that the above mentioned practice was not a uniform one; that sometimes he would take the process up to the marshal's office and deliver it to him, at others would deliver it to the attorney in the case to take to the marshal, and at others would put it in the box for the marshal to call for; *that there was no uniform practice between his office and the marshal's office in reference to the delivery of writs and process for service.* (Record, fols. 43–47). His testimony further tended to show that he had no special recollection about the summons in this suit, either as to when it was issued, or when, how, or by whom it was delivered to the marshal for service, *or whether or not he placed it in the box in his office for the marshal* (record, folio 47).

The bill of exceptions contains all of the evidence offered upon the trial (record, folios 48 and 53), and the foregoing is the substance of it.

Defendant offered no evidence.

There is an entire absence of proof as to when the marshal actually received the summons herein for service, and as to when, how and by whom it was actually delivered to him for service.

He served it *June 3d, 1872, ten years and twenty-one days* from the date of recovery of the judgment sued upon.

Plaintiff requested several instructions to the jury, all of which were refused by the court. (Record, folios 49–51).

The court directed a verdict for the defendant, holding that the suit was not commenced in season to save it from the statute. (Record, folios 40 to 42, and 51 to 54).

Plaintiff's exception to this ruling brings up for review the whole question as to whether or not the proofs established that the suit was commenced in season.

STATUTE OF LIMITATIONS.

The following sections of chapter 138, Revised Statutes of Wisconsin, year 1858, entitled, "Of the limitation of actions," were in force when this action was commenced.

"SECTION 1. Civil actions can only be commenced within the 'periods prescribed in this chapter, except when in special cases 'a different limitation is prescribed by statute. But the objection 'that the action was not commenced within the time limited, can 'only be taken by answer."

* * * * *

"SECTION 14. The periods prescribed in section one of this 'chapter for the commencement of actions other than for the recov-'ery of real property, shall be as follows:"

* * * * *

"SECTION 16. Within ten years:

"1. An action upon a judgment or decree of any court of 'record of any state or territory within the United States, or of 'any court of the United States."

* * * * *

"SECTION 27. An action shall be deemed commenced as to 'each defendant, when the summons is served on him, or on a 'co-defendant, who is a joint contractor or otherwise united in 'interest with him. An attempt to commence an action shall be 'deemed equivalent to the commencement thereof, *within the 'meaning of this chapter*, where the summons is delivered with the 'intent that it shall be actually served, to the sheriff or other 'proper officer of the county in which the defendants, or one of 'them, usually or last resided; or if a corporation be defendant, 'to the sheriff or other proper officer of the county in which said 'corporation was established by law, or where its general business 'is transacted, or where it keeps an office for the transaction of 'business; or if the defendant be a non-resident or a non-resident 'corporation, to the sheriff or other proper officer of the county in 'which plaintiff shall bring his action. But such an attempt must 'be followed by the first publication of the summons, or the ser-'vice thereof within sixty days."

POINTS AND ARGUMENT.

I.

The state statute of limitations can be pleaded in bar of an action brought in the federal court of that state on a judgment recovered in another state; hence it was competent for the defendant to plead the Wisconsin statute in bar of this action.

M'Elmoyle v. Cohen, 13 Peters, 312,

II.

The federal courts are bound by the construction given to the statutes of a state by the courts of such state.

Leffingwell v. Warren, 2 Black, 599, error to the district court of the United States for the district of Wisconsin, was an action of ejectment. Defendant claimed title under a tax deed. The main contention was as to the construction and effect to be given to a statute of the State of Wisconsin limiting the time for the commencement of suits or proceedings for the recovery of lands sold for taxes. We quote the following from the opinion of the court, given by Mr. Justice Swayne, at page 603:

"The courts of the United States, in the absence of legislation 'upon the subject by congress, recognize the statutes of limitations 'of the several states, *and give them the same construction and effect 'which are given by the local tribunals. They are a rule of decision 'under the 34th section of the Judicial Act of 1789.*

'*The construction given to a statute of a state by the highest judicial 'tribunal of such state, is regarded as a part of the statute, and is as 'binding upon the courts of the United States as the text. Shelby vs. 'Guy (11 Wheat. 351); McCluny vs. Silliman (3 Pet. 270); Greene 'vs. Neil's Lessee (6 Pet. 291); Ross vs. Duval (13 Pet. 45); Mas-'singall vs. Downs (1 How. 767); Nesmith vs. Sheldon (1 How. 812); 'Van Rensselaer vs. Kearney (11 How. 297); Webster vs. Cooper (14 'How. 504).*

'If the highest judicial tribunal of a state adopt new views as to 'the proper construction of such a statute, and reverse its former 'decisions, this court will follow the latest settled adjudications. '*United States vs. Morrison (4 Pet. 124); Green vs. McNeil's Lessee '(6 Pet. 291).*"

The court gave such effect to the statute as had been given by the Supreme Court of Wisconsin in several cases.

In *Sanger vs. Nightingale*, 122 U. S. Rep. 176, at page 184, this court after quoting a certain statute of limitations of the State of Georgia, said:

"This being a law of the State of Georgia, we must follow its 'construction by the courts of that state, so far as it has been con-'strued."

III.

Section 27, chapter 138, Revised Statutes of Wisconsin for 1858, above quoted, defines specifically what shall be deemed the commencement of an action *within the meaning of that chapter.*

The chapter is entitled, "Of the limitation of actions;" all of its provisions relate to this subject, and hence are *in pari materia* and must be construed together.

Section 27 incorporates into and rules every other section of the chapter so far as determining what shall be deemed the commencement of a suit, within the meaning of such other section, and the construction given to said section by the Supreme Court of Wisconsin becomes a part of it and is binding upon this court.

What may have been deemed the commencement of a suit at common law, or pursuant to the decisions and practice of courts of other states can have no weight in deciding the question at issue here, because of the statute and the construction given to it by the Supreme Court of Wisconsin.

Section 27, above referred to, was divided into two sections in the revision of 1878, viz: sections 4239 and 4240. We quote them at length here, that the court may see that they are in substance the same as section 27, above quoted.

"SECTION 4239. An action shall be deemed commenced, within the meaning of any provision of law which limits the time for the commencement of an action, as to each defendant, when the summons is served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him."

"SECTION 4240. An attempt to commence an action shall be deemed equivelant to the commencement thereof, within the meaning of any provision of law, which limits the time for the commencement of an action, when the summons is delivered with the intent that it shall be actually served to the sheriff or other proper officer of the county in which the defendants or one of them, usually or last resided; or if a corporation organized under the laws of this state be defendant, to the sheriff or the proper officer of the county in which it was established by law, or where its general business is transacted, or where it keeps an office for the transaction of business, or wherein any officer, attorney, agent or other person upon whom the summons may by law be served, resides or has his office; or if such corporation has no such place of business, or any officer or other person upon whom the summons may by law be served, known to the plaintiff, or if such defendant be a nonresident, or a nonresident corporation, to the sheriff or other proper officer of the county in which plaintiff shall bring his action. But such an attempt must be followed by the first publication of the summons, or the service thereof, within sixty days. If the action be in a court not of record, the service thereof must be made with due diligence."

Sherry and another vs. Gilmore and another, 58 Wis., 324, was an action of ejectment brought to recover certain lands which the defendants claimed to own by virtue of certain tax deeds issued to them by Marathon county. Plaintiffs' initial steps in the action were *the filing of the summons and complaint with the clerk of the court and obtaining an order from a court commissioner for the publication of the summons*, on the ground that the defendants were non-residents of the states, or that their residence could not be

ascertained by plaintiffs. This was done *December 24, 1878.* At March term, 1879, defendants *appeared specially* and moved to vacate the order of publication, which motion the court granted by order dated *March 18, 1879.* No further proceedings in the action were had until April 10, 1880, when the plaintiffs moved for leave to amend summons and complaint, which was granted, with the further order that the amended summons and complaint be served on the defendants within twenty days from the date of the order, *and such service was accordingly made April 29, 1880.* Defendants filed an answer to the amended complaint, setting up title by a tax deed issued to them, dated and recorded November 22, 1877, *and also alleging that the cause of action stated in the complaint did not accrue within nine months before the commencement of the action.*

The statue of limitations covered by this answer is section 6, chapter 334, Laws of Wisconsin for 1878, published March 25, 1878, quoted:

"SECTION 6. Every action or proceeding for the recovery of 'lands heretofore sold, or which may hereafter be sold, for the 'non-payment of taxes heretofore levied, shall be commenced 'within nine months after the recording of the tax deed, and not 'thereafter; *provided*, that in the case of tax deeds heretofore 'issued, the action, if not already barred, shall be brought within 'nine months after the publication of this act, and not thereafter."

Upon the trial it appeared, among other things, that the defendant *Gilmore* was a resident of Waupaca county, Wisconsin, December 23, 1878, and had never resided in *Marathon* county; that there was no service upon him in the action until the service of the amended summons and complaint in April, 1880, except that he received by mail a copy of the original summons and complaint, and that the summons and complaint were not placed in the hands of the sheriff of Waupaca county to serve until the service of the amended summons and complaint.

Defendants appealed to the Supreme Court of Wisconsin from a judgment in favor of the plaintiffs, and one of the main questions decided upon the appeal was whether or not the action had been commenced in time to prevent the running of the statute last above quoted in favor of the tax deed under which defendants claimed. We quote the opinion of the court upon this question at length:

"Was this action commenced within nine months after the 'passage and publication of ch. 334, laws of 1878? This act was 'published March 25th, 1878, and the nine months would expire 'December 24th, 1878. The defendants' first tax deed is one which 'comes within the provisions of sec. 6 of said act (sec. 1210*d* R. S. '1878); and unless the plaintiff's action was commenced on or be-'fore December 24th, 1878, the statute has run in favor of such 'deed, and it cannot be avoided by showing that it was issued upon 'an insufficient affidavit of non-occupancy. The want of a suffi-

'cient affidavit, or the entire lack of one, would be a mere irregularity, and cured by the statute. Was this action commenced before December 25th, 1878, within the meaning of secs. 4239, 4240, which define what shall be deemed a commencement of an action within the meaning of the statutes of limitation? It is evident that it was not commenced by the actual service of the summons upon either of the defendants before that date. If we would be justified in presuming that the summons and complaint were received by one of the defendants December 24th, 1878, by mail, that would not be a service of the summons within the meaning of the statute. The service spoken of in sec. 4239 evidently means a service made in accordance with the provisions of sec. 2636, R. S. 1878. It is very clear that a suit cannot be commenced by simply sending a copy of the summons to the defendant through the mail. Under sec. 4240, 'an attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of any provision of law which limits the time for the commencement of an action, when the summons is delivered with intent that it shall be actually served to the sheriff or other proper officer of the county in which the defendants, or one of them, usually or last resided; * * * or, if such defendant be a non-resident, * * * to the sheriff or other proper officer of the county in which plaintiff shall bring his action.' The above quotation contains all of sec. 4240 which has any application to this case. The evidence in this case fails entirely to show that there was an attempt to commence this action, within the meaning of this section, previous to December 25, 1878.

"It is true that a summons and complaint were filed in the office of the clerk of the circuit court of the county in which the action was commenced, on December 24, 1878, and that an order of publication was obtained on that day; but it does not appear that the *summons was placed in the hands of the sheriff or other proper officer* of the county in which the action was commenced at any time, nor in the hands of the sheriff of the county in which the defendants or one of them resided at the time, until long after the statute had run. If we were to treat the action as properly commenced against the defendants as nonresidents of the state, and that a proper order of publication was obtained,—still the fact that *the summons was not placed in the hands of an officer* of the county in which the action was intended to be commenced, would be fatal to the claim that there was an attempt to commence the action within the meaning of Sec. 4240. It becomes unnecessary, therefore, to determine whether the order of publication was regularly made, or whether the subsequent order of the Circuit Court setting it aside, and declaring it void and of no effect, was erroneous.

"The respondents having failed to show that their action was commenced within nine months after Ch. 334, Laws of 1878,

'took effect, all defects and irregularities in the appellants' first 'tax deed were cured, and the title of the respondents was thereby 'divested, and absolutely became vested in the appellants. Upon 'the evidence, the judgment should have been in their favor."

Here we have a construction by the highest court of Wisconsin, of section 27, above quoted, because, as already stated, sections 4239 and 4240, mentioned in and construed by the opinion, are but a revision of and the same in substance as section 27.

Sherry vs. Gilmore decides plainly and positively two things: 1st. *That filing the summons and complaint with the clerk of the court and procuring an order of publication of summons* was not the commencement of an action within the meaning of section 27; and 2d, that the *delivery to the officer* required by said section is an *actual* and not a *constructive* delivery. In the language of the opinion, *the summons must be placed in the hands of the officer.*

The filing of a præcipe and bond for costs with the clerk, and the making out, testing and sealing of the summons by the clerk, was no more the commencement of the suit at bar, within the meaning of section 27, than was the filing of the summons and complaint with the clerk and procuring an order for publication in *Sherry vs. Gilmore.*

The immediate going of Mr. Miller, one of plaintiffs' attorneys, from the clerk's to marshal's office, after he had filed præcipe and bond with clerk, and telling the marshal that there was a summons in this case in the clerk's office against Anson Eldred for service, was not a delivery of the summons to marshal, either *actual* or *constructive.*

Failure of the marshal to act upon such information would not be such a neglect of official duty as would give plaintiff a right of action against him for any loss suffered thereby.

Had the proofs herein shown a uniform and long-existing practice for the clerk to deposit all writs and process issued by him in a box in his office near the entrance door, which the marshal from time to time would call and get, and that the summons herein was actually deposited by the clerk in said box on the day of its date, a delivery to the marshal, within the meaning of section 27, would not thereby have been established. But, the evidence given showed no such uniform practice, or that there was any uniform practice between the clerk's and marshal's office in reference to the delivery of writs and process for service, and there is an entire absence of proof as to what was done with the summons in this suit, whether or not it was placed by the clerk in the box, or how, or when it got to the marshal. Section 27 was enacted to fix a *definite* rule as to what should be deemed the commencement of actions within the meaning of the several statutes of limitation, and to permit any such loose-jointed, uncertain and intermittent practice between the clerk's and marshal's office, as plaintiff sought to establish herein to answer its requirements, would be to defeat the object of the statute.

IV.

It appearing by the marshal's certificate upon the summons (a part of the record) that it was served after the statute had run, the burden was upon the plaintiff of proving that it had actually delivered the summons to the marshal prior to the expiration of the ten years, so as to bring itself within the provisions of section 27.

Plaintiff offered the summons and the marshal's certificate of service thereon in evidence as a part of its case (record, folios 38 and 39). It thereby proved itself out of court, unless it made the additional proof that it had actually delivered the summons to the marshal for service prior to the 13th day of May, 1872.

Capen vs. Woodrow, 51 Vt. 106.
Prigmore vs. Railroad Co., 1 Lea (Tenn.) 204.
Sherry vs. Gilmore, 58 Wis. 324; see last part of option above quoted.

V.

The court below committed no error in ruling out several questions propounded by plaintiff to the witness Kurtz, clerk of the court.

The first was:

"Can you state what the practice was generally as to attorneys thus delivering their process to the marshal?" (Record, folio 44.)

It was quite immaterial as to what may have been the general practice of attorneys in delivering process to the marshal. No practice, however general or uniform, could supplant the plain provisions of the statute requiring an *actual delivery, a placing in the hands of the officer.*

The second was:

"What, under your usual practice and your usual course of business, would you have done with this summons after it was issued?" (Record, folio 45.)

Although this question was incompetent, and properly ruled out, because no practice or course of business on the part of the clerk could prevail against the statute, yet the plaintiff's counsel, upon explaining to the court that he wished to show that it was witness' custom to place process in the box for the marshal, was permitted to ask the witness a question upon that subject (record, folio 45), whereby the former ruling of the court was in effect cancelled.

The third was:

"Will you state whether there was any rule or practice of the district or circuit courts or either of them on the 11th day of

May, 1872, as to the commencing of suits to save the statute of limitations? If yea, state what the rule was." (Record, folio 45.)

This question was properly ruled out for at least two reasons, viz: *1st.* If there had been any such rule, it was not necessary to prove it by the clerk, as the court would have taken judicial notice of it; and *2d.* Such rule could not prevail against the statute.

ALFRED L. CARY,
Defendant's Attorney.

Supreme Court of the United States.

No. 239.

October Term, 1888.

THE MICHIGAN INSURANCE BANK,
Plaintiff in Error,
vs.
ANSON ELDRED.

Defendant's Reply to Argument of Counsel for Plaintiff in Error.

Counsel for plaintiff in error has devoted much of his brief and argument to the elaboration and establishment of two propositions, viz.:

1st. That the common law governed the practice and procedure in suits at law, in the Federal courts of Wisconsin, on the eleventh day of May, 1872, and 2d. That at common law the issuance of the writ was the commencement of the suit.

We can safely concede the correctness of these propositions, as, in our opinion, they do not touch the question up for decision on this writ of error.

What may have been the forms of writs and process or the methods of procedure, in the Federal courts of Wisconsin, at the date named, for the purpose of giving those courts jurisdiction of parties, and enabling them to enforce remedies, are not questions with which we are dealing upon this writ of

error. They are entirely foreign to the question at issue before us. That question is simply and only, what was it necessary for the plaintiff to do in order to stop the running of the statute of limitations upon his alleged claim or cause of action against the defendant? This question, we say, is entirely independent of that other question, what, under the practice of the court, may have been deemed the commencement of the suit for the purpose of giving the court jurisdiction of the parties, or for the purpose of suspending or ending the period of limitation in the absence of a statute specifically defining it?

Section 27, chapter 138, Revised Statutes of Wisconsin, 1858, entitled, "Of the limitation of actions," distinctly and definitely points out what the plaintiff should do in order to interrupt the running of the statute. This section defines what shall be deemed the commencement of an action within the meaning and for the purposes of the chapter in which it is found. Statutes of limitation are arbitrary measures, creatures of the legislative will, subject only to the overriding rule that the periods of limitation must be reasonable. The legislature has the absolute power of making the periods of limitation long or short, as it pleases, provided, only, that they are reasonable. It can fix the time or circumstance which shall mark the beginning of the period of limitation, and also its ending, and can also provide by what means or measures the running of the statute can be interrupted. It is within the power of the legislature to provide, in such cases, that, not only shall the summons be issued and actually served, but that the declaration or complaint in the action shall be actually filed with the clerk, or that some other arbitrary act, reasonable in itself, shall be done by the plaintiff in order to prevent the running of the statute. These matters are within the power of and entirely at the will of the legislature, so long as they are reasonable.

Section 27 provides in effect that the summons shall be actually served upon the defendant within the period of limitation, or else that it shall be actually delivered to the sheriff, *or other proper officer*, within the period of limitation, and actually served within sixty days thereafter, in order to interrupt the running of the statute. It attached itself to and became part of every other section in the chapter, which provided that an action should be *commenced* within a limited period, or else be barred.

The enactment is the same as if it stated in terms that the action shall be barred unless the summons is delivered to the proper officer for service within ten years after the cause of action accrued. Who can doubt that such an enactment would apply to the Federal courts?

Section 27 had nothing to do with the general practice of the courts, or their methods of acquiring jurisdiction of parties, and enforcing remedies. Neither had it anything to do with the forms of process used. It applied as well to a summons issued under the common law practice as to one issued under the code.

The summons in this suit was directed to the marshal, and commanded him to summon the defendant to appear before the court, on the first Monday of June ensuing, to answer unto the plaintiff in a plea of debt, etc. There was nothing in the practice of the court which required that the return day of this summons should be the first Monday of June. It could have been the first Monday of any other month as well, at the pleasure of the plaintiff. Plaintiff could have made the summons returnable the first Monday of August, and thereby have given the marshal the full sixty days, provided in section 27, within which to make the service after the delivery of the summons to him, and prior to the return day thereof; or the summons, as actually issued in this suit, could have been delivered to the marshal prior to the expiration of the period of limitation, and if for any reason he had failed to

serve it before the return day, an alias summons could then have been issued, returnable at a later period, under which circumstances the delivery of the first summons within the period of limitation would have answered the demands of section 27.

So, we say, there was nothing in the form of the summons in use in the Federal Courts of Wisconsin, on the eleventh day of May, 1872, or in the practice of said courts at that time, which rendered it impossible or impracticable for said courts to give effect to the provisions of section 27.

The learned district judge, who tried this cause, was clearly of the opinion that section 27 was applicable to and ruled this case. We here quote the opinion which he gave in deciding the case, found in the printed record in two detached parts; one at folio 40:

"*Court:* I have considered the question upon which this case of the Michigan Insurance Bank against Anson Eldred turns, as carefully as possible, and, notwithstanding the very interesting argument made by Mr. Miller yesterday afternoon, I have been unable to come to any other conclusion than such as was indicated on the argument. It seems to me that section 27, of chap. 138, of the Revised Statutes of Wisconsin, of 1858, which is declaratory of what shall constitute the commencment of a suit, is so far part and parcel of the body of the statute of limitations that it must be considered as standing in connection *in pari materia*, so to speak, with the preceding section 16, which prescribes the period within which the suit shall be commenced. The whole statute on the subject of limitations is embodied in this chapter, which begins by providing that civil actions shall be commenced within the periods therein prescribed. The section which prescribes the period within which a suit on a judgment shall be brought, declares that such suit shall be commenced with-

in ten years; then follows section 27, which declares that an action shall be deemed commenced when the summons is served on the party, and that an attempt to commence an action shall be regarded as equivalent to its commencement within the meaning of the act, when the process shall be delivered to the officer with intent that it shall be served. The attempt must be made by placing the process in the hands of the officer within the ten years, and the various provisions on the subject must be considered and interpreted in conjunction with each other, and together they form the statute of limitations, which the Supreme Court, in *Leffingwell vs. Warren*, 2 Black, and in various other cases decided since *Leffingwell vs. Warren*, have held to be applicable, and must be recognized and enforced in the Federal courts. In that respect it has been quite impossible for me to make a distinction between the case at bar as here presented, and the case of *Leffingwell vs. Warren*. If the statute under consideration in that case had provided not only that a suit or proceeding for the recovery of land sold for taxes must be brought within three years, but also that such an action should be deemed commenced when the process should be served upon the party, and that an attempt to commence the action should be deemed equivalent to the commencement thereof when the process should be placed in the hands of the officer with intent that it should be served, so that those provisions would stand in connection with each other just as here secs. 16 and 17 stand in chapter 138 of the revision of 1858, can there be any doubt that the Supreme Court would have held that the entire statute, must be taken and considered together, as constituting the statute of limitations, which the courts of the United States, in the absence of legislation on the subject by Congress, must recognize as a statute enforceable in this court? As I indicated yesterday, the whole question turns upon that point.

If section 27 is not to be regarded as a part of the statute of limitations to be recognized by this court, then Mr. Miller is right in his contention that the common-law rule as to what constituted the commencement of an action in 1872 would prevail. It all turns upon that point, and I am unable to perceive why this section 27 must not be regarded as a part of the preceding provision, which prescribes the period of limitation."

And the other at folio 51:

Court: "If the court is correct in the view it has expressed, that the decision of the question at issue must be controlled by the statute of the State in force May 11th, 1872, then I think it is clear that there has been nothing developed in the testimony since adduced which changes the original position of the case, because, if the statute was applicable, then the adjudication of the highest court of the State, reported in 58 Wis., interpreting that statute, is clearly binding upon this court. Although that decision was rendered long subsequent to the commencement of this suit, its effects is to declare the law in this State from the time the statute was passed. All there is of the testimony which has been submitted since the ruling of the court upon the principal question is that the clerk has a box in his office, or, so to speak, a pigeon-hole, where it was his practice, to some extent, to deposit writs, expecting that the marshal would call for them, and, as he testified, that it was the practice of the marshal from time to time to call and see whether there were any writs in that box for service. He does not state that the box was a place designated by the marshal where process should be deposited so as to make the deposit a delivery to the officer, but he does state further that sometimes he would deliver the writ to the marshal himself; sometimes he would deliver it to the attorneys for them to deliver personally to the marshal; and thus it appears, I think, that the evidence does not come up to the point of establishing the fact—and the evidence is

undisputed; there is nothing to submit to the jury—that this box was a place so designated and established by the marshal as to make the deposits of writs in it equivalent to the delivery personally to him. In the case cited in 58 Wis. (*Sherry vs. Gilmore*, 58 Wis. 324) the Supreme Court holds that even where a party takes all the preliminary steps required by law for acquiring jurisdiction of the party in a case where publication is required, the defendant being a non-resident of the State, still that is not sufficient to meet the requirements of this section; that there must be a delivery of the process to the officer in order to make the act an attempt to commence the suit, which is equivalent to commencement of it. Since this case has been upon trial the court thinks it recalls the ground upon which it granted a new trial, which was that the question which has been now so thoroughly argued by Mr. Miller was not so fully presented on the former trial, in 1875, and the court had doubt whether the common-law rule as to what should constitute the commencement of an action did not prevail in this case, and it therefore thought there ought to be a further consideration of that question. The court may be wrong now and counsel for the plaintiff may be right. It is a very good question upon which to take the judgment of the Supreme Court, and happily it is a case that can be taken there, because the amount involved is sufficient. I should very much like to see an adjudication of that court upon the question. For myself, I can only say I have the conviction I have expressed as to what is the law upon the point presented, and I must decide the question in accordance with that conviction."

To hold that section 27 is not applicable to the Federal courts would result in the possibility of having different periods of limitation within the same jurisdiction, under the same statute, giving but one period of limitation. Section 27

being applicable to the State courts, the longest possible period to which the actual service of the summons in actions in said courts could be deferred in order to prevent the running of the statute, would be within sixty days next after the period of limitation named. Section 27 not being applicable to the Federal courts, as claimed by plaintiff's counsel, but the commencement of actions therein being governed by the common-law rule, the summons could be *issued* within the period of limitation, and by a system of *continuances* prevailing under the common-law practice suits could be kept alive and pending for years without the actual service of the process and still be saved from the statute. The practical effect of this would be to give different periods of limitation within the same jurisdiction, under the same statute, providing for but one.

Plaintiff's counsel has cited and quoted from the decisions of the highest courts of many of the states, viz.: New Hampshire, Vermont, Massachusetts, Rhode Island, New York, New Jersey, Illinois and perhaps others, as to what was deemed the issuance of writs and the commencement of suits in those jurisdictions for the purpose of avoiding the statute of limitations.

The rule was by no means uniform at common law. There was much uncertainty and confusion of authority, and it has now become regulated in most of the states by legislative enactments.

Wood on Limitation of Actions, Secs. 289 and 290.

Our answer to all the cases cited and the arguments based thereon is simply this, that in no one of the states named or

from which the cases are cited was there a statute at the time like section 27, providing what should be deemed the commencement of actions within the meaning of the statute of limitations. Before the decision in *Jackson vs. Brooks*, 14 Wend. 649, a statute something like section 27 had been enacted in New York, but it was held not to be applicable to that case.

We will here quote a portion of the opinion of the court in *Johnson vs. Farwell*, 7 Greenleaf 370, not quoted in plaintiff's brief.

"But from whatever cause it may have arisen, inasmuch as what shall be deemed the commencement of the action under the seventh section is not defined, we must construe these words 'commenced and sued' as we should any others, by applying to them the common law definition, *when not defined by statute*. We know of no other guide or safe rule of construction."

This implies that where what shall be deemed the commencement of an action *is defined by statute*, such definition prevails against all others.

Plaintiff's counsel claims that state laws cannot in any way interfere with or change the Federal practice or procedure, and that, therefore, the lower court erred in holding that section 27 applied to process issued by Federal courts. The lower court did not hold that section 27 changed the practice or procedure in the Federal courts, or that it applied to process in those courts any further than was necessary for the purposes of the statute of limitations. The rules and practice of those courts in force at the time, regulated the service of the process in this suit for the purpose of bringing the defendant herein under the jurisdiction of the court. But if section 27 required the plaintiff to do any other or different act than was required by such rules and practice in the mat-

ter of acquiring jurisdiction, in order to interrupt the running of the statute, the court simply held that such other or different act so required by section 27 must be done by the plaintiff in order to prevent his claim from being barred. This is in no sense a regulation of the process or a change in the general practice of the court. Ever since section 27 was enacted, it has been competent under the laws of the State of Wisconsin, regulating the service of process in its courts of record, for any one not a party to the action to serve the summons. But section 27, for the purposes of the statute of limitations, requires the summons, under certain circumstances, to be delivered to the sheriff or other proper officer, and served by him. This is not a change in the general practice of the courts of the state, but only a regulation required by and for the purposes of the statute of limitations.

Section 27 is clearly a rule of decision in and applicable to the Federal courts for the purpose of carrying into effect the statute of limitations because it is a part of such statute. It does not purport to go beyond this.

Plaintiff's counsel has made two statements in his brief, which are not warranted by the testimony. One on page 21, as follows: "And that thereupon, on May 11th, 1872, the clerk filled out the summons, sealed and dated it, *and placed it in a box in his office*, where it had been the custom and practice for years to put process intended for the marshal." And again, on page 29, as follows: "The uncontradicted evidence shows that the summons was delivered to the marshal on May 11, 1872. The placing of the writ in a box in which it was the custom and practice to place writs for the marshal, would, of itself, have constituted a delivery of the writ to him, but not only that was done, but on the same day," etc.

There is no testimony in the case proving that the summons herein was made out on the 11th day of May, 1872,

and certainly none that it was ever placed in the box for the marshal in the clerk's office. The only testimony upon that subject is by Kurtz, the clerk of the court. This was his direct examination as to the summons in question. (Record, folio 44, p. 24).

"Q. Can you state when that summons was filled out by you?

A. I presume it must have been made out on the 11th day of May, 1872; I know of nothing to the contrary. The mark of filing on the præcipe for a summons is in my handwriting; it was filed May 11, 1872.

Q. Do you remember what you did or what was done with this summons after it was issued by you?

A. *I have no special recollection about that particular summons.*"

His cross-examination upon the same subject is as follows (Record, folio 47, page 25):

"Q. Have you any present recollection as to the exact date that you made out this summons in this case?

A. No, sir.

Q. Have you any recollection as to whether you placed this summons in the box that you have spoken of?

A. *I have no special recollection at all about this summons.*

Q. As to whether you placed it in the box, took it up to the marshal or handed it to the attorney?

A. *I have no special recollection as to what I did with it.*"

Not only is there no direct or positive proof that the summons was placed in the box, but there is no sufficient proof to raise the presumption that it was placed there. A general and universal custom of placing papers in the box for the marshal must have been proved in order to raise such a presumption, and there was no proof whatever of any such general or universal custom. The cases cited by the plaintiff's counsel, viz.: *Knickerbocker Life Insurance Co. vs. Pendleton*, 115 U. S. 339, and *Howard vs. Daly*, 61 N. Y. 362, therefore,

have no application to this case. In *Howard vs. Daly*, plaintiff testified that she placed her letter of acceptance of defendant's proposition to her, in the letter box at the theater, and it was held from this that it must be presumed that the defendant received it. Here was positive evidence that the letter was placed in the box; while in the case at the bar there is no such evidence; and further, in *Howard vs. Daly*, the letter box was Daly's, while the box referred in this case belonged to the clerk and not to the marshal, and was in the clerk's office and under his control. In *Knickerbocker Life Insurance Co. vs. Pendleton*, it was proved that a certain bank had a general and uniform way of transacting certain parts of its business, and it was held that such proof raised a sufficient presumption that a certain act in the line of such business was performed, at least, sufficient for the jury to find that the act was performed. That case has no application here, because, we say, that there was no general or uniform practice shown of placing papers in the box for the marshal.

But section 27, as construed by the Supreme Court of Wisconsin, disposes of all these questions. Under such section and construction, it was necessary that the summons should be *actually placed in the hands of the marshal.*

Even if there were evidence that the summons in question had been placed in the box in the clerk's office, that would not be *delivery* to the marshal.

The box was the *clerk's* box in the *clerk's* office. It was wholly within the clerk's possession and control, and all the writs he put in it were still in his possession and control. The mere fact that the marshal would sometimes take them from it, made putting them in that box no more a delivery to the marshal than laying them on his table would, if the marshal had been in the habit of taking them from there when he happened to come into the *clerk's* office.

To constitute a *delivery*, it is, at least, essential that the instrument pass wholly from the control of the party who makes delivery, and into the control of the one to whom delivery is to be made. That certainly would not be done by placing it in this box.

In conclusion, we say, that in no event ought this court to follow the suggestion made by plaintiff's counsel, that in case of a reversal of the judgment herein, it be with directions to enter judgment in favor of plaintiff.

There are many reasons why there should be a new trial in case of reversal, and among others we suggest that the defendant may have proofs to offer under both issues raised by his answer. He should be at liberty to prove, as he was able to do at the first trial of this case, that the summons herein was not delivered to the marshal until the 17th day of May, 1872. Such proof was not offered on the last trial because it was deemed unnecessary, as the burden was upon the plaintiff of showing that the summons was placed in the hands of the marshal in season.

ALFRED L. CARY,
F. C. WINKLER,
Defendant's Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 239.

MICHIGAN INSURANCE BANK,
Plaintiff in Error,
vs.
ANSON ELDRED.

DEFENDANT'S SUPPLEMENTAL BRIEF.

We desire to submit the following suggestions and authorities upon the question as to whether, upon the established facts in the case, the marshal can be presumed to have received the summons prior to May 13, 1872.

The summons bears date May 11, 1872, and was served by the marshal June 3, 1872, but *no presumption* arises from these facts that it was delivered to the marshal prior to May 13, 1872.

A presumption must be based upon a fact, (Richmond *vs.* Aiken, 25 Vermont, 324; Doolittle *vs.* Holton, 26 Vermont, 588; Brunswick *vs.* McKean, 4 Maine, 508; Ellis *vs.* Ellis, 58 Iowa, 720), and not upon inference or upon another presumption (Douglas *vs.* Mitchell, 35 Pa. State, 440).

Lawson on Presumptive Evidence, 569.

In U. S. *vs.* Ross, 92 U. S., 281, Justice Strong uses the following language:

"The law requires an open, visible connection between the principal and evidential facts, and the deductions from them, and does not permit a decision to be made on remote inferences." P. 284.

"The presumption that public officers have done their duty, like the presumption of innocence, is undoubtedly a legal presumption; *but it does not supply proof of a substantive fact.*" P. 284.

After making a quotation from Best on Evidence, sec. 300, Justice Strong again says: "*Nowhere is the presumption held to be a substitute for proof of an independent and material fact.*

Manning *vs.* Insurance Co., 100 U. S., 693.

The substantive fact which the plaintiff was required to show was that the *summons was delivered to the marshal prior to May* 13, 1872.

That the summons was in existence prior to that time can only be presumed from its date, which is May 11, 1872, and there is no other evidence of the fact, and as one presumption cannot be based upon another, there can, therefore, be no legal presumption that the summons was delivered to the marshal prior to May 13, 1872.

The fact that the marshal had possession of the summons June 3, 1872, and served it on that date, does not raise the presumption that he had it in his possession prior to May 13, 1872.

A presumption is not retroactive.

Lawson on Presumptive Evidence, 579 and 580.

Proof that H. was married in 1860 does not raise the presumption that she was married in 1854.

Erskine *vs.* Davis, 25 Ill., 251;
Murdock *vs.* State, 68 Ala., 567.

Proving that B. was a justice of the peace on June 29 does not raise the presumption that he held that office on the 5th day of the same June.

Barrell *vs.* Lytle, 4 La. Ann., 557.

That the marshal served the summons June 3, 1872, rebuts the presumption that he had it in his possession prior to May

13, 1872. It must be presumed that he performed the duties of his office diligently, and that he served the summons at or soon after the time it was received by him. He served it by leaving a copy of it at the defendant's usual place of abode in the city of Milwaukee. This service he could have made at any time, as he was not delayed thereby in seeking the defendant. The service was made on the return day of the summons, which is another reason why it must be presumed that he made the service right after having received the summons.

We also cite a recent case decided by the Supreme Court of Wisconsin, and bearing upon the construction to be given section 27 of chapter 138, Revised Statutes of Wisconsin for 1858: Town of Woodville *vs.* Town of Harrison, Northwestern Reporter, vol. 41, No. 8, p. 526.

A. L. CARY,
F. C. WINKLER,
Defendant's Counsel.

130-699

130-699

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 253.

GEORGE W. HILL, PLAINTIFF IN ERROR,

vs.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, AND WILLIAM H. BARNUM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED APRIL 12, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 253.

GEORGE W. HILL, PLAINTIFF IN ERROR,

vs.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, AND WILLIAM H. BARNUM.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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1 State of Illinois Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the second day of September, in the year of our Lord one thousand eight hundred and eighty-four, within and for the northern grand division of the State of Illinois.

Present: Hon. John Scholfield, chief justice; Pinkney H. Walker, justice; Benj. R. Sheldon, justice; T. Lyle Dickey, justice; John H. Mulkey, justice; John M. Scott, justice; Alfred M. Craig, justice; James McCartney, attorney general; William R. Milligan, sheriff; Everell F. Dutton, clerk.

Be it remembered that heretofore, to wit, on the 19th day of July, A. D. 1884, there was filed in the clerk's office of said court a certified transcript of the record and proceedings of the circuit court of Cook county, in a certain cause entitled in this court—

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSON, and WILLIAM H. BARNUM. } No. 1083. 25.

Error to appellate court, first district.

Which said transcript is in the words and figures following, viz:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, *Cook County,* } *ss:*

Pleas before the Honorable John G. Rogers, one of the judges of the circuit court of Cook county, at a term thereof begun and held at Chicago, in said county and State, on the third Monday (being the 19th day) of November, in the year of our Lord one thousand eight hundred and eighty-three, and of the Independence of the United States the one hundred and eighth.

Present: Honorable John G. Rogers, one of the judges of the circuit court of Cook county, State of Illinois; L. L. Mills, State's attorney; Seth F. Hanchett, sheriff.

Attest:

JACOB GROSS, *Clerk.*

Be it remembered that heretofore, to wit, on the 16th day of March, A. D. 1877, there was filed in said court a certain affidavit in attachment and attachment bond, and there issued out of and under the seal of said court the people's writ of attachment; which said affidavit, bond, and writ, together with the sheriff's return thereon endorsed, are in the words and figures following, to wit:

Affidavit.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County.

William H. Barnum, being duly sworn, deposes and says that George W. Hill is indebted to George F. Harding, Lawrence J. J. Nissen, and William H. Barnum aforesaid, composing the firm of "Harding, Nissen and Barnum," after allowing all just credits and set-offs, in the sum of eight thousand two hundred & sixty-
3 four dollars ($8,264.00) for and upon divers legal and professional services rendered by said firm as attorneys-at-law in prosecuting and defending divers suits at the request of said George W. Hill; and affiant further states that the said George W. Hill is a resident of this State, and that his place of residence is at number 375 Warren avenue, Chicago, Illinois, and that said George W. Hill is about fraudulently to conceal, assign, or otherwise dispose of his property or effects so as to hinder or delay his creditors; and further deponent sayeth not.

WILLIAM H. BARNUM.

Subscribed and sworn to before me this 16th day of March, A. D. 1877.

JACOB GROSS, *Clerk.*

Bond.

Know all men by these presents that we, George F. Harding, Lawrence J. J. Nissen, & William H. Barnum, as principals, and Edwin Lee Brown, as surety, are held and firmly bound unto George W. Hill in the penal sum of seventeen thousand dollars and — cents, lawful money of the United States; for the payment of which said sum, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of March, A. D. 1877.

The condition of this obligation is such that whereas the above-bounden William H. Barnum has on the day of the date hereof prayed an attachment out of the circuit court of Cook county, at the suit of George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, composing the firm of "Harding, Nissen & Barnum," against the estate of the above-named George W. Hill for the sum of eight thousand two hundred and sixty-four dollars and — cents, and the same being about to be sued out of said court, re-
4 turnable on the 16th day of April, A. D. 1877, to the term of the said court then to be holden:

Now, if the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum shall prosecute their said suit with effect, or, in case of failure therein, shall well and truly pay and satisfy the

said George W. Hill all such costs in said suit and such damages as shall be awarded against the said George F. Harding, Lawrence J. J. Nissen, & William H. Barnum, their heirs, executors, or administrators, in any suit or suits which may hereafter be brought for wrongfully suing out the said attachment, then the above obligations to be void; otherwise to remain in full force and effect.

GEO. F. HARDING. [SEAL.]
LAWRENCE J. J. NISSEN. [SEAL.]
WILLIAM H. BARNUM. [SEAL.]
EDWIN LEE BROWN. [SEAL.]

(Endorsed:) Filed and approved by me this 16th day of March, A. D. 1877. Jacob Gross, clerk.

Writ.

STATE OF ILLINOIS, } ss:
County of Cook, }

The people of the State of Illinois to the sheriff of Cook county, Greeting:

Whereas William H. Barnum hath complained that George W. Hill is justly indebted to George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, composing — firm of "Harding, Nissen & Barnum," to the amount of eight thousand two hundred and sixty-four dollars, and oath having been also made that the said George W. Hill is about fraudulently to conceal, assign, or otherwise dispose of his property or effects so as to hinder or delay his creditors;

And the said George F. Harding, Lawrence J. J. Nissen, & William H. Barnum having given bond and security according to law:

We, therefore, command you that you attach so much of the estate, real or personal, of the said George W. Hill to be found in your county as shall be of value sufficient to satisfy the said debt and costs according to the said complaint, and such estate so attached in your hands to secure or so to provide that the same may be liable to further proceeding thereupon according to law, and that you summon George W. Hill to appear and answer the complaint of the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum at a term of the circuit court to be holden at Chicago, in the county of Cook, upon the third Monday of April next, and that you also summon such other persons as you shall be required by the said — as garnishee to be and appear before the said court on the said third Monday of ——, A. D. 187–, then and there to answer what may be objected against, when and where you shall make known to the said court how you have executed this writ; and have you then and there this writ.

Witness Jacob Gross, clerk of our said circuit court, and the seal thereof, at Chicago, in said county, this 16th day of March, A. D. 1877.

[SEAL.] JACOB GROSS, *Clerk.*

(Endorsed.)

By virtue of the said writ I have levied upon all the right, title, and interest of the within-named defendant in and to the following-described property, to wit: Southwest quarter (¼) of section thirty-one (31), in township thirty-eight (38) north, range fifteen (15) east, of the 3d principal meridian; also the northeast quarter (¼) of section thirty-six (36), in township thirty-eight (38) north, of range fourteen (14) east, of the 3rd P. M.; also all the interest of said
6 George W. Hill in Hill's addition to South Chicago, being a subdivision of the southwest quarter of section thirty-one (31), in township thirty-eight (38) north, range fifteen (15) east, of 3rd Pr. M., town of Hyde Park; also the west eighty-eight and one-half (88½) feet of south half of lots nine (9) and ten (10), in block fifty-nine (59), section seven (7), township thirty-nine (39) north, of range fourteen (14) east, of third P. M.; also all interest of said George W. Hill in section fourteen (14), township thirty-seven (37) north, range thirteen (13) east, of 3rd P. M.; also all interest of said George W. Hill in section twenty-seven (27), township thirty-nine (39) north, range fourteen (14) east, of third principal meridian; all of the foregoing-described lands situated in the county of Cook and State of Illinois.

This sixteenth day of March, 1877.

CHARLES KERN, *Sheriff*,
By JOHN GARRICK, *Deputy*.

The within-named defendant not found in my county this 16th day of April, 1877.

CHARLES KERN, *Sheriff*,
By H. B. GALPIN, *Deputy*.

P'd 2.75.

Filed this 18th day of Ap'l, A. D. 1877.

JACOB GROSS, *Clerk*.

And thereupon, on the 24th and 28th days of March, 1877, the following proceedings were had and entered of record in said cause, to wit:

Attachment.

GEORGE F. HARDING *et al.*
vs.
GEORGE W. HILL. } 23977. 7648.

M'CH 24, '77.

And now, at this day, on motion, it is ordered that the time in which to file bond in said cause be, and it is, extended until 2 o'clock Monday morning next.

7 *Attachment.*

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, Composing the Firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977. 7648.

M'CH 28, '77.

This day came the said George W. Hill, as principal, and Horace M. Singer and Thomas B. Rice, as sureties, and entered into a recognizance herein in open court, whereby they, and each of them for themselves, their heirs, executors, and administrators, acknowledged themselves to owe and to be indebted unto the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum in the penal sum of sixteen thousand five hundred and twenty-eight dollars, to be levied of their respective goods and chattels, lands and tenements, and real estate.

The condition of which recognizance was such that if the said George W. Hill should pay to the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum the amount of the judgment and costs which may be rendered against him in this suit on a final trial hereof within ninety days after such judgment shall be rendered, then such recognizance to be void; otherwise to remain in full force and effect.

It is therefore ordered that the attachment herein be and it is dissolved, and that the property taken by virtue thereof be restored to the said defendant.

And thereupon on the 6th day of April, 1877, there was filed in said cause a certain declaration in the words and figures following, to wit:

STATE OF ILLINOIS, } *ss:*
Cook County, }

In the Circuit Court of Cook County, to the April Term, A. D. 1877.

8 George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, copartners doing business under the firm name of Harding, Nissen and Barnum, plaintiffs in this suit, by William H. Barnum, their attorney, complain of George W. Hill, defendant in this suit, who has been summoned, etc., and whose property has been attached of a plea of trespass on the case on promises.

For that whereas heretofore, to wit, on the fifteenth day of March, in the year of our Lord one thousand eight hundred and seventy-seven, at, to wit, the county aforesaid, the said defendant became and was indebted to the said plaintiffs in the sum of, to wit, ten thousand dollars, lawful money of the United States, for the work, labor, and services before that time done and performed for the said defendant by the said plaintiffs, as his attorneys and legal advisers, at the special instance and request of the said defendant, and for

materials furnished and money laid out and expended for the said defendant and in his behalf by the said plaintiffs, at the like special instance and request of the said defendant; and, being so indebted, the said defendant afterwards, to wit, on the day and year and at the place aforesaid, in consideration thereof, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto them, the said plaintiffs, the said sum of money last mentioned whenever he, the said defendant, should be thereunto afterwards requested; and whereas, also, the said defendant afterwards, to wit, on the day and year, at the place aforesaid, became and was indebted to the said plaintiffs for work, labor, and services before that time by the said plaintiffs done and performed for the said defendant, as his attorneys and legal advisers, at the special instance and request of the said defendant; and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year and at, to wit, the county
9 aforesaid, undertook and then and there faithfully promised the said plaintiffs that he, the said defendant, would well and truly pay to the said plaintiffs so much as the said work, labor, and services were reasonably worth whenever he, the said defendant, should be thereunto afterwards requested; and the said plaintiffs aver that the said work, labor, and services were reasonably worth the further sum of, to wit, ten thousand dollars, of which the said defendant afterwards, to wit, on the day and year and at the place aforesaid, had notice; and whereas also the said defendant afterwards, to wit, on the day and year and at the place aforesaid, became and was indebted to the said plaintiffs for work, labor, and services before that time done and performed by the said plaintiffs for the said defendant as the said defendant's attorneys and legal advisers, at the special instance and request of the said defendant, and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay to the said plaintiffs so much as they deserved to have for their said work, labor, and services done and performed by them as aforesaid whenever he, the said defendant, should be thereunto afterwards requested; and the said plaintiffs aver that for said work, labor, and services they deserve the further sum of, to wit, ten thousand dollars, of which the said defendant afterwards, to wit, on the day and year and at the place aforesaid, had notice; and whereas also the said defendant afterwards, to wit, on the same day and year and at the place aforesaid, became and was indebted to the said plaintiffs in the further sum of, to wit, ten thousand dollars, of like lawful money as aforesaid, for money before that time lent and advanced by the said plaintiffs to the said defendant and at the like request of the said defendant, and in the like sum for other money by the said
10 plaintiffs before that time paid, laid out, and expended for the said defendant and at the like request of the said defendant, and in the like sum for other money by the said defendant before that time had and received to and for the use of the said plaintiffs, and in the like sum for other money before that time and then due

and owing the said plaintiffs for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendant to said plaintiffs, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiffs for the said defendant and at the like special request of the said defendant, and, being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiffs well and truly to pay unto the said plaintiffs the several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested: Nevertheless the said defendant (although often requested, etc.), has not yet paid the said several sums of money above mentioned or any or either of them or any part thereof to the said plaintiffs, but to pay the same or any part thereof to the said plaintiffs the said defendant has hitherto altogether refused and still does refuse, to the damage of the said plaintiffs of, to wit, ten thousand dollars, and therefore the said plaintiffs bring suit, etc.

WILL. H. BARNUM,
Plaintiffs' Attorney.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of Cook County. April Term, A. D. 1877.

11 GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, Copartners, &c., under Firm Name of Harding, Nissen and Barnum,

vs.

GEORGE W. HILL.

STATE OF ILLINOIS, } ss:
Cook County, }

William H. Barnum, being first duly sworn, deposes and on his oath says that he is a member of the firm of Harding, Nissen and Barnum, and one of the plaintiffs in the above-entitled cause, and that he is conversant with all the matters and things pertinent and relating thereto, and he says that the demand of the said plaintiffs against the said defendant is for work, labor, and services by the said plaintiffs done and performed for the said defendant, at his request, as his attorneys and legal advisers, and for money paid out and expended, for and at the request of the said defendant, by the said plaintiffs, and that after allowing to the said defendant all his just credits, deductions, and set-offs there is due and owing from the said defendant to the said plaintiffs the sum of eight thousand two hundred and sixty-four dollars ($8,264).

WILLIAM H. BARNUM.

Subscribed and sworn to before me this 6th day of April, A. D. 1877, by the said William H. Barnum.

[SEAL.] ADOLPH MOSES, *N. P.*

12 *Copy of Account Sued On.*

Mr. George W. Hill to Harding, Nissen and Barnum, Dr.

1876.				
January	5.	To taking deposition of Holmes, Hill *ats.* Porter	20 00*	
	8–10.	" " " in St. Louis, " " Searle	75 00	
	14 to February —.	" preparing and trying case of " " Kibbs	4,500 00	
January	19.	" cash paid for copy of deed	2 00	
	29.	" attendance in court on motion in " " Wheat to strike pleas from file	5 00	
February	14.	" demurrer to declaration in Wheat *vs.* Hill sustained and judgment *vs.* plaintiffs	5 00	
March	4.	" attendance on superior court on motion to file new declaration in Wheat *v.* Hill	5 00	
	21.	" drawing & filing pleas to amended declaration and drawing affidavit of merits in Wheat *v.* Hill	15 00	
April	12.	" vacating judgment " "	10 00	
June	5–13.	" preparing and trying Porter case and settling certificate of evidence	2,000 00*	
	17.	" attendance in criminal court	10 00	
	20.	" " " " "	5 00	
July	8.	" " " " "	10 00	
Sept.	—.	" trial notice in four suits in U. S. court	10 00	
"	—.	" trip to Quebec, $100. (This is paid.)		
October	2.	" retainer and plea in suit of R. K. Turner of malprosecution	100 00	
	16.	" attendance in crim. c't & preparing & serving notice of witnesses	7 00	
	19.	" attendance in crim. c't	5 00	
	21.	" " " " " & drawing affidavit of record	10 00	
13				
October	27.	" attendance in crim. c't & visits to Van Arman's office	15 00	
	30.	" " " " "	10 00	
November	2.	" " " " "	5 00	
	9.	" " " U. S. " watching call	10 00	
	"	" " " " " passing cases	10 00	
November	— to December —.	" preparing and trying forgery case *v.* Turner in criminal court, consultations with witnesses, associate counsel, &c.	1,500 00	
1877.				
February	10.	" services, consultation & advice in extradition matter	20 00	
		" additional services—attendance upon courts, on notices and motions, interviews with witnesses, consultations, etc.	250 00*	
				8614
		" work, labor, and services as attorneys	----	10000
		" money paid, laid out, and expended	----	10000
		" money had and received to and for the use of the plaintiffs	----	10000
		" money due for interest and forbearance	----	10000
		" labor, services, and material	----	10000

*Stricken out by leave of court.

14 And thereupon on the 18th day of April, 1877, there were filed in said cause certain pleas in the words and figures following, to wit:

Attachment.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of said County, to the April Term, A. D. 1877.

GEORGE W. HILL

ats.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, WILLIAM H. BARNUM, Composing the Firm of Harding, Nissen & Barnum.

And the said defendant, by Leonard Swett, his attorney, comes and defends the wrong and injury when, &c., and saith that he did not undertake or promise in manner or form as the said plaintiff hath above thereof complained against him, and of this he puts himself upon the country, &c.

By LEONARD SWETT AND
JOHN J. HERRICK,
Att'ys for Def't.

And the said plaintiffs do the like, &c.

HARDING, NISSEN & BARNUM, *Pro Se.*

Attachment.

STATE OF ILLINOIS, } ss:
Cook County, }

In the Circuit Court of said County, to the April Term, A. D. 1877.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, WILLIAM H. BARNUM, Composing the Firm of Harding, Nissen and Barnum,

vs.

GEORGE W. HILL.

15 STATE OF ILLINOIS, } ss:
Cook County, }

And the said George W. Hill, defendant in the above-entitled cause, makes oath and says that he verily believes he has a good defense to this suit upon the merits as to the whole and to every part of the said plaintiffs' demand.

GEORGE W. HILL.

Subscribed and sworn to before me this 17th day of April, A. D. 1877, by George W. Hill. Witness my hand and official seal.

[SEAL.] WILLIAM H. HOLDEN, *N. P.*

STATE OF ILLINOIS, } ss :
Cook County, }

In the Circuit Court of said County, to the April Term, A. D. 1877.

GEORGE W. HILL

ats.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, Partners, &c.

And the defendant, by Leonard Swett, his attorney, comes and defends, &c., and prays judgment of the said writ and that the same may be quashed, because he says he was not, at the time said affidavit of said plaintiff Barnum was made and filed herein or at the time said writ of attachment was issued or at any time before said writ of attachment was issued, about fraudulently to conceal, assign, or otherwise dispose of his property or effects or any part thereof so as to hinder or delay his creditors; and of this the defendant puts himself upon the country, &c.

By LEONARD SWETT AND
JOHN J. HERRICK,
His Attorneys.

Attachment.

16 STATE OF ILLINOIS, } ss :
Cook County, }

In the Circuit Court of said County, to the April Term, A. D. 1877.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, Partners, &c.,

vs.

GEORGE W. HILL.

STATE OF ILLINOIS, } ss :
Cook County, }

George W. Hill, the defendant in the above cause, being first duly sworn, on oath says that the plea by him above pleaded is true in substance and in fact.

GEORGE W. HILL.

Subscribed and sworn to before me this 17th day of April, A. D. 1877.

[SEAL.] WILLIAM H. HOLDEN,
Notary Public.

And thereupon, on the 26th day of May, 1877, the following proceedings were had and entered of record in said cause, to wit:

Attachment.

GEORGE F. HARDING *et al.*
vs.
GEORGE W. HILL. } 23977. 7648.

On motion of said plaintiffs, by their attorney, it is ordered by the court that the plea of said defendant filed herein traversing the attachment writ issued in said cause be, and the same is hereby, stricken from the files of said cause.

And thereupon, on the 18th, 19th, 20th, 21st, 22nd, 25th,
17 26th, 27th, 28th, and 29th days of March, and on the 1st, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, and 12th days of April, 1878, the following, among other, proceedings were had and entered of record in said cause, to wit:

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, William H. Barnum, Composing the Firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

M'CH 18, '78.

This day came the said parties, by their respective attorneys, and thereupon also came the jurors of a jury of good and lawful men, to wit, C. R. Crossman, William A. Brainard, George Valentine, Thomas Murphy, Charles Peterson, Martin Van Mehlen, Charles E. Hull, John Muldoon, William Peterson, J. B. Craney, Peter Curry, and C. M. Wood, who were duly empanelled and sworn to well and truly try the issues joined in said cause and a true verdict render according to the evidence, and thereupon (the hour of adjournment having now arrived) the said jurors were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

M'CH 19, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing part of the testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

18 *Attachment.*

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL.
} 23977. 3220.

M'CH 20, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in there*after* to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL.
} 23977. 3220.

M'CH 21, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL.
} 23977. 3220.

M'CH 22, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of
19 adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Monday morning next.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

M'CH 25, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W HILL. } 23977. 3220.

M'CH 26, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony, were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

M'CH 27, '78.

19½ This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

M'CH 28TH, 1878.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

MARCH 29TH, 1878.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Monday morning next.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

APRIL 1, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Wednesday morning next.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 32 20.

APRIL 3, '78.

21 This day came again the said parties, by their respective attorneys, and thereupon came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, as Harding, Nissen and Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

APRIL 4, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

APRIL 5, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further testimony in said cause (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof Monday morning next.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

APRIL 8, '78.

22 This day came again the said parties, by their respective attorneys, and also came again the jurors of the jury aforesaid, and thereupon, after further and concluding testimony was adduced, on motion of plaintiffs, by their attorney, leave is granted them to amend the bill of particulars on file in said cause by striking out therefrom the item of $2,000.00 of the Porter case, to which ruling of the court the said defendant, by his attorney, now here excepts; whereupon the said jurors, after hearing part of the arguments of counsel (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

APRIL 9, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further arguments of counsel (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL. } 23977. 3220.

APRIL 10, '78.

This day came again the said parties, by their respective attorneys, and also came the jurors of the jury aforesaid, who, after hearing further arguments of counsel (the hour of adjournment having now arrived), were allowed to separate and meet the court at the coming in thereof to-morrow morning.

23 *Attachment.*

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL.
} 23977. 3220.

APRIL 11, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid, who, after hearing further and concluding arguments of counsel, as well as instructions from the court, retired from the bar of the court to consider of their verdict, with leave from the court, by agreement of counsel, that when they shall have agreed upon a verdict they may reduce it to writing, sign and seal the same, separate and meet the court at the coming in thereof to-morrow morning.

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL.
} 23977. 3220.

APRIL 12, '78.

This day came again the said parties, by their respective attorneys, and thereupon also came the jurors of the jury aforesaid and return into court their sealed verdict, whereby they do say, "We, the jury, find the issue for the plaintiffs and assess the damages at thirty-five hundred dollars ($3,500.00)."

Whereupon the said defendant, by his attorney, moves the court to set aside said verdict and for a new trial of said cause.

And thereupon, on the 11th day of May, 1878, the following proceedings were had and entered of record in said cause, to wit:

24 *Attachment.*

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and William H. Barnum, Composing the Firm of Harding, Nissen & Barnum,
vs.
GEORGE W. HILL.
} 23977. 3220.

This day came the attorney for said defendant and suggests upon the record that said defendant has been adjudicated a bankrupt by proceedings in bankruptcy, and moves the court for a stay of proceedings herein; and the court, after hearing arguments of counsel thereon and being fully advised in the premises, doth overrule said motion.

Whereupon came on to be heard the motion of said defendant to set aside the verdict of the jury aforesaid and for a new trial, and was argued by counsel, and the court, being fully advised in the premises, doth overrule said motion.

Wherefore it is ordered and considered by the court that said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, composing the firm of Harding, Nissen and Barnum, plaintiffs, recover of said George W. Hill, defendant, the sum of thirty-five hundred dollars, their damages so as aforesaid by the jury assessed, together with their costs in this behalf expended, to be taxed and have execution therefor.

To all of which the said defendant, by his attorney, now here excepts and prays an appeal to the appellate court of the first district of Illinois, which is granted on condition that said defendant doth, within twenty days from date, execute and file an appeal bond in said cause in the penal sum of five thousand dollars, with good and sufficient security thereto; and it is further ordered that said defendant be, and he is, allowed sixty days from date in which to prepare and file a bill of exceptions in said cause.

25 And thereupon, on the 22nd day of May, 1878, there was filed in said cause a certain appeal bond in the words and figures following to wit:

(Bond not on file.)

And thereupon, on the 1st day of July, 1878, there was filed in said cause a certain bill of exceptions in the words and figures following, to wit:

Attachment.

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Circuit Court of Cook County.

GEO. F. HARDING, LAWRENCE J. J. NISSEN, & WILLIAM H. BARNUM
vs.
GEORGE W. HILL.

Be it remembered that on the 28th day of March, A. D. 1877, it being then of the March term of said circuit court, the following order was made and entered of record in said cause—that is to say:

This day came the said George W. Hill, as principal, and Horace M. Singer and Thomas B. Rice, as sureties, and entered into a recognizance herein in open court, whereby they and each of them for themselves, their heirs, executors, and administrators, acknowledge themselves to owe and to be indebted unto the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum in the penal sum of sixteen thousand five hundred and seventy-eight dollars, to be levied of their respective goods and chattels, lands and tenements, and real estate; the condition of which recognizance was such

that if the said George W. Hill should pay to the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum the amount of the judgment and costs which may be rendered against
26 him in this suit on a final trial thereof within ninety days after such judgment shall be rendered, then such recognizance shall be void; otherwise to remain in full force and effect.

It is therefore ordered that the attachment herein be and it is dissolved, and that the property taken by virtue thereof be restored to said defendant.

And be it also remembered that on the 26th day of May, A. D. 1877, it being then of the May term of said circuit court, the following order was made by said circuit court by Hon. Wm. K. McAllister, one of the judges thereof, and entered of record in said cause—that is to say:

On motion of said plaintiffs, by their attorney, it is ordered by the court that the plea of said defendant filed herein traversing the affidavit for the attachment writ issued in said cause be, and the same is hereby, stricken from the files of said cause.

And be it also remembered that on the day when the trial of the above-entitled cause was commenced before the Hon. Henry Booth, one of the judges of said court, to wit, on the 17th day of March, A. D. 1878, and before the trial of said cause was commenced, the said defendant made a motion in said court, before said judge, to reinstate the plea filed by him in said cause on April 18, 1877, traversing the affidavit for the writ of attachment issued in said cause, which was commenced by attachment, and for leave to contest the grounds on which said writ of attachment was issued before trying said cause on the merits, which affidavit was filed by said plaintiffs in said cause on the 16th day of March, A. D. 1877, and which plea so traversing said affidavit was stricken from the files by said court on the 26th day of May, A. D. 1877; but the said court, on the day and year aforesaid, to wit, the 17th day of March, A. D. 1878, and before the commencement of said trial, overruled said motion so
27 made by said defendant; to which action of said court in so overruling said motion the said defendant at the time and in open court duly excepted; that on the hearing of said motion so made as aforesaid no evidence save the records and files of said court in said cause was submitted by either of said parties, and said plea so traversing said affidavit for said writ of attachment was stricken from the files at the time hereinbefore stated on the ground that said attachment was previously to the filing of said plea and on said defendant's motion dissolved by the entry of the recognizance of record in said cause given by said defendant, as principal, and Horace M. Singer and Thomas B. Rice, as sureties, and said court denied said motion solely on and from the facts appearing on the face of the record & files in said cause.

28 And be it also remembered that the account filed with the declaration is said cause and for the recovery of the items whereof said suit was brought, as amended, was and is as follows and not otherwise or different, to wit:

Copy of Account Sued On.

Mr. George W. Hill to Harding, Nissen and Barnum, Dr.

1876.				
January	8–10.	To taking deposition in St. Louis, Hill *ats.* Searle	75 00	
to February	14 —.	" preparing and trying case of " " Kibbs	4,500 00	
January	19.	" cash paid for copy of deed	2 00	
	29.	" attendance in court on motion in " " Wheat to strike pleas from file	5 00	
February	14.	" demurrer to declaration in Wheat *v.* Hill sustained and judgment *vs.* plaintiffs	5 00	
March	4.	" attendance on superior court on motion to file new declaration in Wheat *v.* Hill	5 00	
	21.	" drawing & filing pleas to amended declaration and drawing affidavit of merits in Wheat *v.* Hill	15 00	
April	12.	" vacating judgment " "	10 00	
June	17.	" attendance in criminal court	10 00	
"	20.	" " "	5 00	
July	8.	" " "	10 00	
Sept.	—.	" trial notices in four suits in U. S. court	10 00	
		" trip to Quebec ($100); this is paid.		
October	2.	" rotainer and plea in suit of R. K. Turner of malprosecution	100 00	
	16.	" attendance in crim. c't & preparing and serving notices of witnesses	7 00	
29				
October	19.	" attendance in crim. c't	5 00	
	21.	" " " & drawing affidavit of rec'd.	10 00	
	27.	" " " & visits to Van Arman's office	15 00	
	30.	" " "	10 00	
November	2.	" " "	5 00	
	9.	" " U. S. " watching call	10 00	
	11.	" " " " passing cases	10 00	
November to December	— —.	" preparing and trying forgery case *v.* Turner in criminal court, consultations with witnesses, associate counsel, &c.	1,500 00	
1877.				
February	10.	" services—consultation & advice—in extradition* matter	20 00	
		" additional services—attendance upon courts on notices and motions, interviews with witnesses, consultations, etc.	250 00*	
				8614
		" work, labor, and services as attorneys	----	10000
		" money paid, laid out, and expended	----	10000
		" money had and received to and for the use of the plaintiffs	----	10000
		" money due for interest and forbearance	----	10000
		" labor, services, and material	----	10000

30 And the plaintiffs, on the trial of said cause before said judge and jury, offered and introduced evidence tending to prove all of the items of said account; and the defendant on said trial offered and introduced evidence under his plea of the general issue filed April 18, 1878, in denial of said evidence of said plaintiffs, and the

* Erased in original.

said items of said account are the only matters which were or are involved in said cause and on which the verdict hereinafter mentioned by said court was founded.

The jury impanelled in said cause on the 12th day of April, A. D. 1878, and of the March term of said circuit court of that year, retired, and after deliberation brought in their verdict in the following words and figures:

"We, the jury, find the issue for the plaintiffs and assess the damages at thirty-five hundred dollars ($3,500).

"CHARLES E. HULL, *Foreman.*"

And thereupon and on the same day and year last aforesaid said defendant entered his motion in said cause for a new trial thereof and for cause why such motion should be granted afterwards on May 11, 1878, filed in said cause in writing the following point, showing why said motion for a new trial should be granted, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM

vs.

GEORGE W. HILL.

Action of assumpsit.

In support of the motion for a new trial heretofore made in this cause the defendant files the following reason:

The court erred in denying the motion of the defendant to restore or reinstate his plea, traversing the facts stated in the affidavit for the attachment.

31 Afterwards, on April 20, 1878, plaintiffs, by their counsel, on notice duly given to defendant's counsel, called up for argument and disposal said motion of defendant for a new trial, but said defendant's counsel insisted upon and obtained from the court a delay of three weeks, until May 11, 1878, for the court's action upon said motion for a new trial, plaintiffs, by their counsel, objecting to said postponement.

And afterwards, and before any judgment was rendered on said verdict in said cause, and before any other or further proceedings were had or taken in said cause, and on the seventh (7th) day of May, A. D. 1878, it being then of the April term of said court for that year, the said defendant filed in said cause with the clerk of this court a certificate in words and figures following:

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In the District Court of the United States for the Northern District of Illinois.

In the Matter of GEORGE W. HILL, by whom a petition for adjudication of bankruptcy was filed on the 22nd day of April, A. D. 1878, at Chicago, in said district, on the first day of May, A. D. 1878, before Homer N. Hibbard, Esq., register in bankruptcy.

I, Homer N. Hibbard, one of the registers in bankruptcy of said court, upon good proof before me taken, do find that the said George W. Hill has become a bankrupt within the true intent and meaning of the Revised Statutes of the United States, title LXI, bankruptcy, and amendments thereof, and I do hereby declare and adjudge him a bankrupt.

Witness my hand, at Chicago, in said district, on the first day of May, A. D. 1878.

32 H. N. HIBBARD,
Register in Bankruptcy.

NORTHERN DISTRICT ILLINOIS, *ss:*

In the District Court of the United States for the Northern District of Illinois. In Bankruptcy.

In the Matter of GEORGE W. HILL, Bankrupt.

I, Homer N. Hibbard, a register in bankruptcy in and for the said northern district of Illinois, do hereby certify that the above and foregoing hereunto attached is a true copy of the adjudication of bankruptcy on debtors' petition in the above-entitled matter, as the same remain in my office.

In witness whereof I have, at the city of Chicago, in said district, hereunto set my hand this 1st day of May, A. D. 1878.

H. N. HIBBARD,
Register in Bankruptcy.

And afterwards, to wit, on the eleventh (11th) day of May, A. D. 1878, and before any other proceedings were had or taken in said cause in said circuit court and before said motion of said defendant for a new trial had been argued or disposed of, the said defendant, having given to said plaintiffs one day's notice in writing in this behalf, suggested to said circuit court and on the record thereof, before the said judge thereof, that said George W. Hill, defendant, had been, and on the first (1st) day of May, A. D. 1878, was, adjudicated a bankrupt on his own petition as aforesaid by the district court of the United States for the northern district of Illinois, sitting as a bankrupt court, and made a motion in said circuit court, before said judge, and in said cause, to stay further proceedings in said cause in said circuit court to await the determination of said court of
33 bankruptcy on the question of the discharge of said George W. Hill in bankruptcy, and said defendant, at the same time

and on the hearing of his said motion for such stay of proceedings, presented to said circuit court, without objection thereto, the aforesaid certificate of H. N. Hibbard.

And it not being denied or questioned by any one that said George W. Hill had been adjudicated a bankrupt, as aforesaid, counsel for plaintiffs and for defendant argued said motion for stay of proceedings on the basis that said fact of the bankruptcy of said George W. Hill existed as stated in said certificate, and the court decided said motion on the basis that said fact of bankruptcy did exist.

Whereupon plaintiffs, by their counsel, insisted upon the taking up of defendant's said motion for a new trial first in order, but the court, determining otherwise, after hearing arguments of counsel on said motion for said stay of proceedings, overruled the same; to which action of said circuit court in so overruling said motion for said stay of proceedings the said defendant, at the time the same was taken, in open court, duly excepted.

And thereupon afterwards, and on the same day, the said motion of said defendant for a new trial in said cause came on to be heard before said circuit court, the same judge presiding, and said circuit court, after hearing arguments of counsel on said motion for a new trial, overruled the same and rendered a judgment on said verdict of said jury; to which action of said circuit court in so overruling said motion for a new trial and in rendering judgment on said verdict in favor of said plaintiffs and against said defendant said defendant, at the time the same was taken, in open court, duly excepted.

And now, forasmuch as the matters and things aforesaid do not appear of record in said cause in said court, the said defend-
34 ant tenders to the said judge, the Hon. Henry Booth, who tried said cause, this bill of exceptions in said cause, and prays that the said judge may sign and seal the same so as to make the matters and things aforesaid a part of the record in said cause in said circuit court, which is accordingly done on this 25 day of June, A. D. 1878.

HENRY BOOTH, *Judge.* [SEAL.]

And thereupon, on the 24th day of November, 1883, the following proceedings were had and entered of record in said cause, to wit:

Attachment.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL. } 23977.

And now on this day comes into court Lawrence J. J. Nissen, plaintiffs' attorney, and moves the court to vacate the judgment theretofore entered in this cause and to redocket said cause and to have judgment entered upon the verdict heretefore rendered in this cause in conformity with the directions and mandate of the appel-

late court of the first district, a transcript whereof reversing the judgment heretofore entered in said cause and remanding the same, with directions for further proceedings, has been filed in this court on the thirteenth day of November, eighteen hundred and eighty-three, and it appearing to the court that due notice of the filing of said transcript and of this motion has been given by said plaintiffs to Messrs. Brandt and Hoffmann, defendant's attorneys, more than ten days ago, whereupon it is ordered that said cause be, and it hereby is, redocketed; and thereupon the said defendant enters his cross-motion for leave to file an amended plea in said cause. On consideration thereof the court overrules said cross-motion; to
35 which ruling said defendant excepts, whereupon the said defendant, by his said attorney, moves the court for judgment in this case in favor of defendant and against plaintiffs upon the evidence of discharge in bankruptcy of said defendant; which motion is overruled by the court; to the overruling of which the said defendant excepts; and thereupon the said plaintiffs, by their attorney, filed and produced to the court here in evidence a certified copy of discharge in bankruptcy of said defendant, whereupon the said defendant, by his said attorney, moves for judgment in favor of defendant and against said plaintiffs, releasing said defendant from all liability subsequent to April 22nd, 1878, on account of all causes of action involved in this suit; on consideration whereof the court doth overrule said motion; to which ruling of the court the said defendant, by his attorney, now here excepts, whereupon the court, being fully advised in the premises, doth sustain the motion of said Lawrence J. J. Nissen, plaintiffs' attorney, so entered herein as aforesaid, to vacate the judgment heretofore entered in this cause; and it is ordered that said judgment be, and it hereby is, vacated and held altogether for naught.

And, it having been made satisfactorily to appear to the court here that since the rendition of the verdict in the above-entitled cause the said defendant, George W. Hill, has received his discharge in bankruptcy, as appears from a duly certified copy of said discharge, under the seal of the district court of the United States of America for the northern district of Illinois and the hand of its clerk, now produced to the court and duly filed herein, it is, in accordance with the directions in said mandate contained—

Ordered that said plaintiffs have and recover of the said defendant the sum of thirty-five hundred dollars damages, and it is further ordered that execution on this judgment be perpetually stayed.

To all of which the said defendant, by his attorney, now
36 here excepts and prays an appeal to the appellate court of the first district of Illinois, which is granted, on condition that said defendant doth, within thirty days from date, execute and file an appeal bond in said cause in the penal sum of five thousand dollars, with good and sufficient security thereto, to be approved by the court or by the clerk of this court.

And it is further ordered that said defendant be, and he is, allowed thirty days from date in which to prepare and file a bill of exceptions in said cause.

To the granting of said appeal the said plaintiffs, by their attorney, now here except.

And thereupon, on the 8th day of December, 1883, a certain order was made and entered of record and a certain bill of exceptions was filed in said cause; which said order and bill are in the words and figures following, to wit:

Order.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL. } 23977.

Attachment.

And now, at this day, as per stipulation filed herein, it is ordered that the time in which to file appeal bond in said cause be and it is extended until January 15th, 1884.

Bill of Exceptions.

STATE OF ILLINOIS, *Cook County,* } ss:

Circuit Court thereof. November Term, A. D. 1883.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL.

Be it remembered that heretofore, to wit, on the 24th day of November, A. D. 1883, being one of the days of said term of
37 said court, before his honor John G. Rogers, one of the judges of said court, the following proceedings were had, to wit, L. J. J. Nissen, Esq., appearing for plaintiffs; George W. Brandt, Esq., appearing for defendant:

Mr. NISSEN: I have filed the mandate from the appellate court, which reverses and remands this case and directs what judgment to enter. I filed that on the 13th, giving Mr. Brandt notice.

At a term of the appellate court begun and held at Chicago on Tuesday, the second day of October, in the year of our Lord one thousand eight hundred and eighty-three, within and for the first district of the State of Illinois.

Present: Hon. Wm. K. McAllister, presiding justice; Isaac G. Wilson, justice; Joseph M. Bailey, justice; Eli Smith, clerk; Seth F. Hanchett, sheriff.

TUESDAY, *November 13th, A. D.* 1883.

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM. } No. 207.

Appeal Cook circuit.

And now, on this day, this cause coming on to be heard upon the motion of the appellees to remand this cause to the circuit court of Cook county in accordance with the mandate of the supreme court of the State of Illinois, and the court being now fully advised in the premises, it is ordered by the court that said motion be sustained and that the judgment of the circuit court of Cook county be reversed and the said cause remanded to that court with direc-
38 tions to that court that, upon it satisfactorily appearing that the appellant has since the rendition of the verdict in said cause received his discharge in bankruptcy, it enter a judgment in favor of the plaintiffs and against the said defendant upon the verdict heretofore entered in this cause, with a perpetual stay of execution.

And it is further considered and ordered by the court that said appellant recover from the said appellees his costs by him in this behalf expended and that he have execution therefor.

I, Eli Smith, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order of said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 13th day of November, in the year of our Lord one thousand eight hundred and eighty-three.

[SEAL.] ELI SMITH,
Clerk of the Appellate Court of the First District.

The notice is as follows:

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL.

To Messrs. Brand & Hoffmann, defendant's attorneys:

Take notice that the mandate of the appellant court of the first district, issued in this cause to the said circuit court, has
39 this day been filed therein, and that I shall, on Saturday, the 24th instant, at the coming in of the court, or as soon thereafter as counsel can be heard, appear before the Honorable John G.

Rogers, judge of said circuit court, at the room usually by him occupied as a court room, and move the court to redocket said cause and enter judgment therein as directed by said mandate, when and where you can attend, if you see fit.

13th November, 1883.

L. J. J. NISSEN,
Pl'ffs' Att'y.

The court thereupon ordered said cause to be reinstated in said circuit court and redocketed therein.

Mr. BRANDT: Now, I have a motion which is as follows:

STATE OF ILLINOIS, } ss:
County of Cook, }

Circuit Court of Cook County. November Term, A. D. 1883.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
v.
GEORGE W. HILL.

And now, on this 24th day of November, A. D. 1883, said defendant, by Brandt & Hoffmann, his attorneys, comes and presents to the court the annexed plea, and offers to file the same in said cause, and moves said court for leave to file the same.

BRANDT & HOFFMANN,
Def't's Att'ys.

Said annexed plea so offered to be filed was in words and figures following, viz:

STATE OF ILLINOIS, } ss:
County of Cook, }

40 Circuit Court of Cook County. November Term, A. D. 1883.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL.

Assumpsit.

And now, on this 24th day of November, in this same term, comes the said defendant, George W. Hill, by his attorneys, Brandt & Hoffmann, and says that said plaintiffs ought not further to maintain their aforesaid action against him, the defendant, because he says that after the last proceedings in this cause in this court, to wit, after the twelfth day of April, A. D. 1878, and of the March term, A. D. 1878, of this court, on which last-named day the verdict in this cause was rendered, and after, to wit, the eleventh day of May, A. D. 1878, and of the April term, A. D. 1878, of this court, on which last-

named day the judgment was entered in this cause by this court after the making of the several supposed promises in said declaration mentioned, and before this day, to wit, on the fifteenth day of September, A. D. 1879, the district court of the United States of America for the northern district of Illinois granted to the said defendant a certain discharge in these words and figures, to wit:

District Court of the United States, Northern District of Illinois.

Whereas George W. Hill, of Chicago, in the county of Cook, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States—title, "Bankruptcy"—and appears to have conformed to all the requirements of law in that behalf:

It is therefore ordered by the court that said George W. Hill be forever discharged from all debts and claims which by said title are made provable against his estate and which existed on the twenty-second day of April, A. D. eighteen hundred and seventy-
41 eight, on which day the petition for adjudication was filed by him, George W. Hill, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of said court, at Chicago, in the said district, this fifteenth day of September, A. D. eighteen hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

[SEAL.] WM. H. BRADLEY, *Clerk.*

And the said defendant further says that the several supposed causes of action in said declaration mentioned are in respect of debts and claims, and each of them is in respect of a debt or claim by said Revised Statutes of the United States—title, "Bankruptcy"—made provable against the estate of said defendant, and which existed on and before said twenty-second day of April, A. D. 1878, and that said several supposed causes of action are not nor are any nor any one of them in respect of any such debt or debts as is or are by said Revised Statutes of the United States—title, "Bankruptcy"—excepted from the operation of a discharge in bankruptcy, and this the said defendant is ready to verify; wherefore he prays judgment if said plaintiffs ought further to maintain their aforesaid action against him, &c.

BRANDT & HOFFMANN,
Attorneys for said Defendant.

I ask leave to file that plea now at this stage of the case.

But the court overruled said motion and refused to allow said defendant to file said plea; to which ruling of the court said defendant then and there duly excepted.

Whereupon said plaintiffs, by their attorney, presented to the court a paper in the words and figures following, viz:

42 District Court of the United States, Northern District of Illinois.

Whereas George W. Hill, of Chicago, in the county of Cook, in said district, has been duly adjudged a bankrupt under the Revised Statutes of the United States—title, "Bankruptcy—" and appears to have conformed to all the requirements of law in that behalf, it is therefore ordered by the court that said George W. Hill be forever discharged from all debts and claims which by said title are made provable against his estate and which existed on the twenty-second day of April, A. D. eighteen hundred and seventy-eight, on which day the petition for adjudication was filed by him, George W. Hill, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy.

Given under my hand and the seal of said court, at Chicago, in the said district, this fifteenth day of September, A. D. eighteen hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

[SEAL.] WM. H. BRADLEY, *Clerk.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true copy of the certificate of discharge in the matter of George W. Hill, bankrupt, in bankruptcy, as appears from the records and originals thereof now in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said district, this twenty-seventh day of October, A. D. 1883.

43 [SEAL.] WM. H. BRADLEY, *Clerk.*

Mr. BRANDT: What is the next step?

The COURT: Mr. Nissen offers to show he was a bankrupt, and produces the certificate of bankruptcy.

Mr. BRANDT: I object to trying any question of fact before this court.

The COURT: Objections overruled and exception by defendant.

Mr. BRANDT: I desire now to have this case redocketed in its proper order. I want the case to take its proper place and await its proper order of trial, and I now make that motion.

Motion overruled by the court; to which ruling of the court the defendant then and there excepted.

Mr. BRANDT: The next motion I desire to make is that the issue in this case by the appellate court directed to be tried—that is, whether the defendant has been discharged in bankruptcy—be tried by jury. I want a jury trial of that fact, and move that when it is tried it be tried by jury.

Motion overruled by the court; to which ruling of the court the defendant then and there excepted.

The COURT: On the presentation of the certificate of bankruptcy the order can be entered now.

Mr. BRANDT: I object to the reception of this alleged copy of the discharge of the defendant in bankruptcy, because this is not the proper tribunal to present it to; it should be presented to a jury. I object to the document itself also, because it is not certified to according to law. There is no certificate of the presiding judge in addition to the clerk's certificate, as is required on certificates issuing from a court of foreign jurisdiction. The district court of the United States is as much a court of foreign jurisdiction to
44 this court as a court of New York or England. I make that specific objection to it that there is no certificate of the presiding judge of the court, a copy of whose record it purports to be, verifying the paper.

But the court overruled said objections and received said paper in evidence; to which ruling of the court defendant then and there excepted.

Said paper so presented to the court by the attorney for said plaintiffs and so admitted in evidence by the court was the only evidence offered or received showing or tending to show that said defendant had been discharged in bankruptcy.

And thereupon, immediately after the reception of said paper in evidence by the court, said defendant made the following motion, viz:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM

vs.

GEORGE W. HILL.

And now said defendant, by Brandt & Hoffmann, his attorneys, moves said court, upon the evidence of the discharge in bankruptcy of said defendant introduced herein, to enter a judgment in this case in favor of said defendant and against said plaintiffs.

Motion overruled by the court; to which ruling of the court defendant then and there excepted.

And immediately after the overruling of the last above motion said defendant made the following motion, viz:

STATE OF ILLINOIS, } ss:
Cook County, }

Circuit Court of Cook County.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM
vs.
GEORGE W. HILL.

45 And now said defendant, by Brandt & Hoffmann, his attorneys, moves said court, upon the evidence of the discharge in bankruptcy of said defendant introduced herein, to enter a judgment in this case in favor of said defendant and against said plaintiffs, releasing said defendant from all liability subsequent to the twenty-second day of April, A. D. 1878, on account of all causes of action involved in this suit.

Motion overruled by the court; to which ruling of the court defendant then and there excepted.

The COURT: Now, I sustain the motion to enter judgment as the appellate court directs. The judgment will be for thirty-five hundred dollars and costs, and then the clerk will enter an order perpetually staying execution.

To which ruling of said court the defendant then and there excepted; and, forasmuch as the matters aforesaid do not fully appear of record, said defendant tenders this bill of exceptions and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made and provided, and it is done accordingly this 8th day of December, A. D. 1883.

JNO. G. ROGERS, [SEAL.]
Judge, &c.

And thereupon, on the 10th day of January and on the 7th day of February, 1884, the following proceedings were had and entered of record in said cause, to wit:

Attachment.

GEORGE F. HARDING *et al.*
vs.
G. W. HILL. } 23977. 105½.

JAN. 10, '84.

And now, at this day, as per stipulation filed herein, it is ordered by the court that the time in which to file appeal bond in said
46 cause be, and it is, extended until the 10th day of February, 1884.

Attachment.

GEORGE F. HARDING *et al.*
vs.
G. W. HILL. } 23977. 105½.

FEB. 7, '84.

And now, at this day, as per stipulation filed herein, it is ordered that the time in which to file an appeal bond in said cause be and it is extended until the 25th instant.

And thereupon on the 13th day of February, 1884, there was filed in said cause a certain appeal bond in the words and figures following, to wit:

Know all men by these presents that we, George W. Hill, of the city of Denver, State of Colorado, and Horace M. Singer and Thomas B. Rice, of the county of Cook and State of Illinois, are held and firmly bound unto George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, also of the same county and State, in the penal sum of five thousand dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this 24th day of November, A. D. 1883.

The condition of the above obligation is such that whereas the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum did, on the 24th day of November, A. D. 1883, in the circuit court of Cook county, in the State aforesaid, and of the November term thereof, A. D. 1883, recover a judgment against the above-bounden George W. Hill for the sum of thirty-five hundred dollars, and from which said judgment of the said circuit court of Cook county the said George W. Hill has prayed for and obtained
47 an appeal to the appellate court within and for the first district of said State:

Now, therefore, if the said George W. Hill shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in said appellate court, then the above obligation to be void; otherwise to remain in full force and virtue.

GEO. W. HILL. [SEAL.]
HORACE M. SINGER. [SEAL.]
THOMAS B. RICE. [SEAL.]

Taken and entered into before me, in Chicago, this 13th day of Feb'y, A. D. 1884.

JNO. G. ROGERS, *Judge, &c.*

STATE OF ILLINOIS, } ss:
Cook County, }

I, Jacob Gross, clerk of the circuit court of Cook county, and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete transcript of the record in certain cause lately pending in said court, on the common law side thereof, between George F. Harding *et al.*, plaintiffs, and George W. Hill, defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, in said county, this 19th day of February, 1884.

[COURT SEAL.] JACOB GROSS, *Clerk.*

48 In the Appellate Court of the State of Illinois, First District.
March Term, A. D. 1884.

GEORGE W. HILL, Appellant,

vs.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, WILLIAM H. BARNUM, Appellees.

And now comes said appellant, by Brandt & Hoffmann, his attorneys, and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

1st. The court erred in refusing appellant leave to file his plea of his discharge in bankruptcy.

2nd. The court erred in refusing to permit said case to be docketed in its regular order and await its regular order for trial and in trying the same out of its regular order.

3rd. The court erred in refusing to permit the question of fact as to whether or not appellant had been discharged in bankruptcy to be tried by jury and in trying the same without a jury.

4th. The court erred in receiving in evidence the paper purporting to be a copy of appellant's discharge in bankruptcy, and, generally, the court erred in admitting incompetent evidence.

5th. The court erred in denying appellant's motion to render judgment for him in this cause.

6th. The court erred in denying appellant's motion to render a judgment releasing appellant from all liability subsequent to April 22nd, A. D. 1878, on account of all causes of action involved in this suit.

7th. The court erred in rendering the judgment against appellant.

8th. There was no verdict in existence in the case on which to render judgment.

9th. The judgment in the case was for appellees, while it should have been for appellant.

49 Wherefore and for divers other errors apparent in said record appellant prays that the judgment rendered in said cause be reversed.

BRANDT & HOFFMANN,
Attorneys for Appellant.

In the Appellate Court, First District Illinois.

GEORGE W. HILL
vs.
GEORGE F. HARDING *et al.* } No. 1856.

Appeal Cook circuit.

I, Eli Smith, clerk of the appellate court within and for the first district of Illinois, hereby certify that the transcript of record hereto attached and marked — is the original transcript of record filed in said appellate court on the 5th day of March, A. D. 1884, by said George W. Hill.

In testimony whereof I have hereunto set my hand and seal of said court, at Chicago, this 16th day of July, A. D. 1884.

[COURT SEAL.] ELI SMITH,
Clerk of the Appellate Court, First District Illinois.

Which said transcript is endorsed: "1856. Appellate court, 1st dist. Ill. Filed Mar. 5, 1884. Eli Smith, clerk. Gen. No. 1083. Filed July 19, 1884. E. F. Dutton, clerk."

50 Be it remembered that afterwards, to wit, on the day and year last aforesaid, viz., July 19, A. D. 1884, there was filed in the office of the clerk of said court a certified transcript of the record and proceedings of the appellate court of Illinois for the first district in said cause; which said transcript is in the words and figures following, viz:

At a term of the appellate court begun and held at Chicago on Tuesday, the fourth day of March, in the year of our Lord one thousand eight hundred and eighty-four, within and for the first district of the State of Illinois.

Present: Hon. Wm. K. McAllister, presiding justice; Isaac G. Wilson, justice; Joseph M. Bailey, justice; Seth F. Hanchett, sheriff; Eli Smith, clerk.

At the March Term, A. D. 1884.

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM. } No. 1856.

Appeal Cook circuit.

Be it remembered that on the 19th day of March, A. D. 1884, the same being one of the days of the March term, A. D. 1884, the fol-

lowing proceedings were had and entered of record in said cause, to wit:

GEORGE W. HILL *vs.* GEORGE F. HARDING *et al.*

Appeal Cook circuit.

This day came appellees, by counsel, and moved the court to dismiss said appeal out of this court, and filed their written argument in support of said motion, and the court, not being fully ad-
51 vised in the premises, doth take said motion under advisement.

And thereupon, on the 22nd day of May, A. D. 1884, the following proceedings were had and entered of record in said cause, to wit:

GEORGE W. HILL *vs.* GEORGE F. HARDING *et al.*

Appeal Cook circuit.

Said cause having this day been reached in the call of the docket, and no one appearing to argue the same, and the court not being fully advised in the premises doth order that said cause be taken under advisement.

And thereupon, on the 25th day of June, A. D. 1884, the following order of affirmance was made and entered of record in said cause, viz:

GEORGE W. HILL *vs.* GEORGE F. HARDING *et al.*

Appeal Cook circuit.

On this day came again the said parties, and the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error; therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said George F. Harding *et al.*, appellees, recover of and from the said George W. Hill, appellant, their costs by them in this behalf expended, to be taxed, and that they have execution therefor.

52 And thereupon, on the 15th day of July, A. D. 1884, in vacation after the March term, A. D. 1884, the following order was made and entered of record in said cause, to wit:

GEORGE W. HILL *vs.* GEORGE F. HARDING *et al.*

Appeal Cook circuit.

This day came the appellant, by Brandt & Hoffmann, his counsel, and prayed an appeal in said cause to the supreme court of Illinois, and the court, after hearing argument of counsel and being fully advised in the premises, are of opinion that no appeal is allowable in said cause. Therefore it is ordered that the motion of said appellant be, and the same is hereby, denied.

JOSEPH M. BAILEY, *Judge.*

I, Eli Smith, clerk of the appellate court in and for the first district of Illinois, do hereby certify that the foregoing is a true copy of all orders and proceedings of the said appellate court in the above-entitled cause, of record in my office.

In testimony whereof I have set my hand and affixed the seal of the said appellate court, at Chicago, this 16th day of July, in the year of our Lord one thousand eight hundred and eighty-four.

[COURT SEAL.] ELI SMITH,
Clerk of the Appellate Court of the First District.

In the Supreme Court of the State of Illinois, Northern Grand Division. September Term, A. D. 1884.

53 GEORGE W. HILL, Plaintiff in Error,

v.

GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, Defendants in Error.

Error to the appellate court for the first district of Illinois.

And now comes said plaintiff in error, George W. Hill, by Brandt & Hoffmann, his attorneys, and says that in the record and proceedings in said cause there is manifest error in this, to wit:

1st. Said appellate court erred in approving the action of said circuit court in refusing plaintiff in error leave to file his plea of his discharge in bankruptcy.

2nd. Said appellate court erred in approving the action of said circuit court in refusing to permit said cause to be docketed in its regular order and await its regular order for trial, and in trying the same out of its regular order.

3rd. Said appellate court erred in approving the action of said circuit court in refusing to permit the question of fact as to whether or not plaintiff in error had been discharged in bankruptcy to be tried by jury, and in trying the same without a jury.

4th. Said appellate court erred in approving the action of said circuit court in receiving in evidence the paper purporting to be a copy of the discharge of plaintiff in error in bankruptcy, and in holding that plaintiff in error had been discharged in bankruptcy.

5th. Said appellate court erred in approving the action of said

circuit court in denying the motion of plaintiff in error to render judgment for him in this cause.

6th. Said appellate court erred in approving the action of said circuit court in denying the motion of plaintiff in error to enter a judgment releasing him from all liability subsequent to April 22nd, A. D. 1878, on account of all causes of action involved in this suit.

54 7th. Said appellate court erred in approving the action of the circuit court in holding that there was a verdict in existence in this case on which a judgment could be rendered.

8th. Said appellate — erred in approving the action of said circuit court in rendering a judgment against plaintiff in error which might deprive him of a privilege claimed by him under a law of the United States, viz., the Statute of the United States relating to bankruptcy.

9th. Said appellate court erred in affirming the judgment of said circuit court.

Wherefore and for divers other errors apparent in said record appellant prays that said judgment of said appellate court may be reversed.

BRANDT & HOFFMANN,
Attorneys for Plaintiff in Error.

Endorsed: Filed July 19, 1884. E. F. Dutton, clerk.

Be it remembered that afterwards, to wit, on the 3rd day of September, A. D. 1884, the same being one of the regular days of said term of said supreme court, certain proceedings were had and orders made and entered of record by said court, among which is the following, viz:

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WM. H. BARNUM. } 25.

Error to 1st district.

And now comes the defendants in error herein, by Harding, Nissen and Barnum, their attorneys, and move the court for cause shown to dismiss the writ of error herein, which said motion is by order of the court taken under advisement.

Be it remembered that afterwards, to wit, on the 4th day of September, A. D. 1884, the same being one of the regular days of said supreme court, certain proceedings were had and orders made
55 and entered of record by said court, among which is the following, viz:

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WM. H. BARNUM. } 25.

Error to 1st district.

And now, on this day, the cause coming on for hearing of the motion of defendants in error heretofore entered herein to dismiss the writ of error herein, the decision and determination of said motion is by the court reserved to the final hearing of said cause.

Be it remembered that afterwards, to wit, on the 5th day of September, A. D. 1884, the same being one of the regular days of said term of said supreme court, certain proceedings were had and orders made and entered of record by said court, among which is the following, viz:

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WM. H. BARNUM. } 25.

Error to appellate court of Illinois, first district.

Now, on this day, this cause comes on for hearing in the regular call of the docket, and it appearing to the court that the defendants in error have all been served with the process of this court more than ten days prior to the first day of the present term, and that a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, have been duly filed, as required by law and the rules of this court in that behalf made and provided, and that this cause is here submitted upon such transcript, abstracts, briefs, and arguments for the consideration and judgment of the court: Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

56 State of Illinois Supreme Court, Northern Grand Division.

At a supreme court begun and held at Ottawa on Tuesday, the first day of September, in the year of our Lord one thousand eight hundred and eighty-five, within and for the northern grand division of the State of Illinois.

Present: John H. Mulkey, chief justice; John M. Scott, justice; John Scholfield, justice; Simon P. Shope, justice; Benj. R. Sheldon, justice; Alfred M. Craig, justice; ——— ———, justice; George R. Hunt, attorney general; William R. Milligan, sheriff; Alfred H. Taylor, clerk.

Be it remembered that afterwards, to wit, on the 25th day of January, A. D. 1886 (being in vacation after said term), certain orders were made and entered of record by said court, among which is the following, viz:

GEORGE W. HILL
vs.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, WILLIAM H. BARNUM. } No. 1083. 17 A. D.

Error to appellate court, first district.

On this day came again the said parties, and, the court having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition of the judgment aforesaid is there anything erroneous, vicious, or defective, and that that record is no error, therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand
57 in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said defendants in error recover of and from the said plaintiff in error their costs by them in this behalf expended, and that they have execution therefor.

Be it remembered that afterwards, to wit, on the 25th day of January, A. D. 1886, the opinion of the court was filed in the clerk's office of said court in words and figures following, to wit:

58 *Opinion by Craig, J.*

GEORGE W. HILL
vs.
GEORGE F. HARDING *et al.* } No. 1083. 17 A. D.

Error to first district.

This was an action by attachment brought in 1877 by defendants in error in the circuit court of Cook county against George W. Hill to recover for services rendered as attorneys. The writ of attachment was levied on certain property belonging to Hill, and for the purpose of releasing it from the levy, as provided by sec. 15, chap. 11, R. L., 1874, he, with certain persons as sureties, entered into a recognizance conditioned for the payment of the judgment which might be rendered against him in the cause in a final trial thereof. After entering into this recognizance the attachment was dissolved and the property released to Hill, as provided by the section of the statute *supra*. Upon a trial of the cause in the circuit court, before a jury, on the 12th day of April, 1878, the jury found the issues for the plaintiffs and returned a verdict in their favor for $3,500. The defendant entered a motion for a new trial. On the 22nd day of April, 1878, Hill filed his petition in bankruptcy in the district court of the U. S. for the northern district of Illinois, and on the first day of May following he was adjudged a bankrupt. On the 7th of

May be filed in this cause a certificate that he had been adjudged a bankrupt, and on the 11th day of the same month he entered a motion for a stay of further proceedings in the cause until the court of bankruptcy should pass upon the question of his discharge. The circuit court denied the motion for a stay, overruled the motion for a new trial, and rendered judgment on the verdict. On appeal, the judgment was affirmed in the appellate court, and the judgment of the appellate court was subsequently affirmed here. See Hill *vs.* Harding, 93 Ill., 77. The construction of a statute of the U. S. being involved, the defendant Hill then removed the cause by
59 writ of error to the Supreme Court of the United States and the judgment of this court was reversed. Hill *vs.* Harding, 107 U. S., 631. And the cause was remanded for further proceedings, in conformity with the opinion. The order of reversal having been filed in this court on the 27th day of Sept., 1883, an order was entered reversing the former judgment of the circuit court, and the cause was remanded, and the circuit court was directed, if it was made satisfactorily to appear that since the rendition of the verdict Hill had received his discharge in bankruptcy, the circuit court should then enter judgment on the verdict theretofore rendered, with perpetual stay of execution. On the 24th day of Nov., 1883, the cause was redocketed in the circuit court and Hill appeared and asked leave to file a plea, in which he set up his discharge in bankruptcy. This the court denied and the defendant excepted to the decision. The defendants in error then presented to the court what purported to be a certified copy of a certificate of discharge of plaintiff in error Hill, in bankruptcy, granted by the district court of the United States for the northern district of Illinois, and the court, after denying Hill's request for a jury and his request that the case should take its proper place on the docket and wait its regular call for trial, entered a judgment on the verdict of the jury for $3,500, with perpetual stay of execution. We have been favored with an able and elaborate argument from counsel for plaintiff in error in which it is claimed that the judgment rendered in the circuit court is erroneous. If the judgment rendered by the circuit court followed the mandate of this court, which was predicated upon the opinion of the Federal court, then the judgment will have to be affirmed. If, on the other hand, the judgment of the circuit court did not conform to the order reversing and remanding, it will have to be reversed. It may be observed that the cause was not remanded to the circuit court for the trial of any issue or question of fact before a jury.

60 This court had decided that the decision of the circuit court denying a stay of proceedings to await the determination of the court in bankruptcy on the question of Hill's discharge was proper. The writ of error brought before the Federal court for review that decision, and the Federal court held that the decision was erroneous and reversed and remanded for further proceedings in conformity to the opinion. In the opinion to which the proceedings were required to conform we find the following. The stay does not operate as a bar to the action, but only as a suspension of proceed-

ings until the question of the bankrupt's discharge shall have been determined in the United States court sitting in bankruptcy. "After the determination of that question in that court the court in which the suit is pending may proceed to render such judgment as the circumstances of the case may require. If the discharge is refused, the plaintiff, upon establishing his claim, may obtain a general judgment. If the discharge is granted, the court in which the suit is pending may then determine whether the plaintiff is entitled to a special judgment for the purpose of enforcing an attachment made more than four months before the commencement of the proceedings in bankruptcy, or for the purpose of charging the sureties upon a bond given to dissolve such an attachment." (107 U.S. Rep., 633,'4.) There were directions to be followed after the cause was remanded and placed upon the docket for final disposition, and from these directions it seems plain that if it appeared that the bankrupt court had refused Hill's discharge, then plaintiffs in the action would be entitled to a general judgment against him for the amount the jury had found to be due them. If, on the other hand, Hill had received his discharge in bankruptcy, it was not the duty of the court to refuse to render a judgment of any character against him, but in that event the court might determine whether the plaintiffs were
61 entitled to a special judgment for the purpose of preserving rights acquired in an action of attachment commenced more than four months before any proceedings were instituted in the bankrupt court.

In the remanding order which this court entered for the direction of the circuit court, where a final disposition of the case was to be made, the order required that court to enter a special judgment on the verdict if it appeared to the satisfaction of the court that Hill had been discharged with a perpetual stay of execution. This, as we understand the opinion of the Federal court, was a full compliance with the directions of that court; but it is said in the argument, "If the sureties in the recognizance are compelled to pay this debt Hill will be obliged to reimburse them, and will thus be entirely deprived of the benefit of his discharge in bankruptcy, if he has one." The sureties of Hill on his recognizance are not before the court, and it will be time enough to determine their rights and liabilities and the rights and liabilities of Hill to them when a proper case presents these questions for determination. The only question presented by this record is whether the judgment rendered in the circuit court was the proper judgment to be rendered in the case. Counsel for plaintiff in error in argument ask this question: Does the judgment against Hill with perpetual stay of execution render the sureties in the recognizance to dissolve the attachment liable for the amount of said judgment, or can any judgment be entered which will render them liable for the same? And it is insisted that this is a question which it is necessary now to decide. We only regard it necessary now to determine what kind of a judgment was proper to be rendered. The ultimate effect of that judgment upon parties not before the court we do not understand to be a question fairly presented by the record, and what might be said in this case

upon that point would be *obiter dictum* in any subse-
62 quent proceeding against the sureties. It is also claimed that the court erred in refusing to permit Hill's plea of bankruptcy to be filed. The cause was not remanded for trial. That was not the object or purpose of the remanding order, so that no necessity existed for making any change whatever in the pleadings. The fact that Hill had secured his discharge in bankruptcy could be made to appear as well without pleading that fact as if a plea had been filed, nor was there any fact to be tried by a jury, as claimed in the argument. It is also claimed that the court erred in admitting in evidence the paper purporting to be a copy of the discharge of Hill in bankruptcy. The objection urged to the introduction of the evidence is that the copy of the discharge was not properly certified. Whether the paper was properly authenticated or not was a matter of little moment. It was a fact not in dispute that Hill had received his discharge. Counsel for Hill undertook to plead the fact by special plea, and when the same fact was proven by counsel for defendants in error without a plea it is difficult to see upon what ground objection can be raised to the evidence. That Hill had received his discharge seems to have been conceded by both sides. It is also claimed that the court erred in entering judgment against Hill. It is said that there was no verdict to enter judgment upon that. It had been merged in judgment, and when that judgment was reversed that ended both judgment and verdict. It will be remembered that after the verdict was obtained and before judgment upon it Hill entered his motion for a stay of proceedings until the bankrupt court should pass on his discharge. This application the court denied, and this decision in the Federal court was held to be erroneous. Now, the correction of that error would leave
the verdict standing as it was before the court overruled the
63 application, and all the court had to do was to receive evidence of the discharge and then render a proper judgment on the original verdict, which, as we understand the record, was the same found by the circuit court. A motion was entered to dismiss the writ of error, but we perceive no merits in the motion. Whether the court erred in the rendition of the judgment was a question which plaintiff in error had the right to present for determination.

The judgment will be affirmed.

64 STATE OF ILLINOIS, }
Northern Grand Division, } *ss:*

Supreme Court.

I, Alfred H. Taylor, clerk of the supreme court for the northern grand division of the State of Illinois, and keeper of the records and seal thereof, do hereby certify the above and foregoing to be a true copy of a certified transcript of the record and proceedings of the circuit court of Cook county, Illinois, and appellate court of Illinois, first district, together with the record and proceedings and opinion of the said supreme court in a certain cause lately pending in said court, wherein George W. Hill was plaintiff in error and George F.

Harding, Lawrence J. J. Nisson, and William H. Barnum were defendants in error, as the same appears from the records and files in my office still remaining.

In testimony whereof I have set my hand and affixed the seal of said supreme court, at Ottawa, this eighteenth day of February, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Supreme Court, State of Illinois. Aug. 23, 1818.]

A. H. TAYLOR,
Clerk of the Supreme Court.

I do hereby certify that the annexed certificate and attestation of A. H. Taylor are in due form of law; and I do further certify that he is clerk of the supreme court for the northern grand division of the State of Illinois, and that his signature to said certificate is genuine.

Given at Ottawa, Illinois, March 15th, A. D. 1886.

JOHN H. MULKEY,
Chief Justice of the Supreme Court of the State of Illinois.

65 *Copy of Bond.*

Know all men by these presents that we, George W. Hill, of Denver, State of Colorado, as principal, and Edward T. Singer, as surety, of Cook county, State of Illinois, are held and firmly bound unto George F. Harding, Lawrence J. J. Nissen, and William H. Barnum in the penal sum of five hundred dollars ($500), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly, by these presents.

Witness our hands and seals this twenty-fourth day of March, A. D. 1886.

The condition of the above obligation is such that whereas the said George F. Harding, Lawrence J. J. Nissen, and William H. Barnum did, on the 25th day of January, A. D. 1886, by the order and opinion of the supreme court of the State of Illinois, recover a judgment of affirmance of a judgment of the appellate court of Illinois for the first district, which last judgment was an affirmance of a judgment of the circuit court of Cook county, State of Illinois, as well as for costs of suit, from which said judgment of said supreme court of Illinois said George W. Hill is about to prosecute a
66 writ of error from the Supreme Court of the United States to said supreme court of Illinois:

Now, therefore, if the said George W. Hill shall prosecute his said writ of error with effect and if he fail therein shall answer all costs, then the above obligation to be void; otherwise to remain in full force and virtue.

GEORGE W. HILL. [SEAL.]
EDWARD T. SINGER. [SEAL.]
——— ———. [SEAL.]

Approved by Wm. H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois.

In testimony whereof I have hereto subscribed my name and affixed the seal of said court, at my office in Chicago, in said district, April 2, 1886.

WM. H. BRADLEY, *Clerk*,
[COURT SEAL.] By E. A. DRUMMOND, *Dep'ty Clerk.*

Bond approved, but not to operate as a supersedeas, this April 6, '86.

JOHN M. HARLAN,
Justice Sup. C't U. S., 7th Circuit.

Endorsed: "Filed April 9, 1886. A. H. Taylor, clerk."

67 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between George W. Hill, plaintiff in error, and George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of
68 or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the

said Supreme Court, the sixth day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
JOHN M. HARLAN,
Justice Sup. C't U. S.

April 6, '86.

69 The United States of America to George F. Harding, Lawrence J. J. Nissen, and William H. Barnum, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein George W. Hill is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John M. Harlan, associate justice of the Supreme Court of the United States, this sixth day of April, in the year of our Lord one thousand eight hundred and eighty-six.

JOHN M. HARLAN,
Associate Justice Sup. C't U. S.

70 On this — day of ——, in the year of our Lord one thousand eight hundred and eighty —, personally appeared —— ——, before me, the subscriber, —— ——, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——.

Sworn to and subscribed the — ——, A. D. 188–.

—— ——.

Received a copy of within document this 10th day of April, A. D. 1886.

GEORGE F. HARDING.
L. J. J. NISSEN, &
WM. H. BARNUM.

71 UNITED STATES OF AMERICA, *State of Illinois*, } ss:

Supreme Court, Northern Grand Division.

To the honorable the Chief Justice and associate justices of the Supreme Court of the United States:

I, Alfred H. Taylor, clerk of the supreme court of Illinois in and for the northern grand division of said State of Illinois, and keeper

of the records and seal thereof, do certify and return to the said annexed writ of error that the certified copy of the record and proceedings in said supreme court of Illinois hereunto annexed is a full, true, and correct copy of all the record and proceedings in said supreme court of Illinois in said cause, wherein George W. Hill was plaintiff in error and George F. Harding, Lawrence J. J. Nissen, and William H. Barnum were defendants in error, wherein judgment was rendered by said supreme court of Illinois against said plaintiff in error on the 25th day of January, A. D. 1886; and I further return herewith a full, true, and complete copy of the opinion of said supreme court of Illinois, certified with the record and proceedings aforesaid, and a copy of the bond given by said plaintiff in error in that behalf, the original of said bond remaining on file in my said office.

Witness my hand and the seal of said supreme court, at Ottawa, in said northern grand division of said State, this ninth day of April, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

A. H. TAYLOR,
Clerk of the Supreme Court.

72 To the honorable the justices of the Supreme Court of the United States:

Your petitioner, George W. Hill, respectfully shows unto your honors that he is aggrieved by a final judgment of the supreme court of the State of Illinois, rendered on the 25th day of January, A. D. 1886, in a suit then in said last-mentioned court pending, wherein your petitioner was plaintiff in error and George F. Harding, Lawrence J. J. Nissen, and William H. Barnum were defendants in error, which said judgment was in affirmance of the judgment of the appellate court of the first district of said State, and that said last-mentioned judgment was an affirmance of the judgment of the circuit court of Cook county, in said State, in a certain action, in which said George F. Harding, Lawrence J. J. Nissen, and William
H. Barnum were plaintiffs and your petitioner was defendant,
73 by which last-mentioned judgment the said plaintiffs in said action were considered to recover of your petitioner the sum of $3,500 and costs, with perpetual stay of execution. Said judgment was rendered in an action of assumpsit, in which a provisional attachment had been sued out by the plaintiffs at the commencement of the action and levied on certain of the defendant's property, to release which the defendant gave a recognizance, with sureties under the statute of Illinois, to dissolve the attachment.

Before any judgment was rendered in said suit by said circuit court your petitioner claimed to have been adjudged a bankrupt under the act of Congress to establish a uniform system of bankruptcy throughout the United States, approved March 2d, A. D. 1867. He also moved said circuit court, before any judgment was

rendered against him therein, to stay all further proceedings
74 in said circuit court in said cause to await the determination of the court of bankruptcy on the question of his discharge as a bankrupt. He based his motion on section twenty-one of said bankrupt act. He also claimed that the debt due from him to said plaintiffs in said suit, which was the foundation of the judgment of said circuit court, was one provable under said bankrupt law. Said circuit court refused to stay said proceedings and rendered a judgment against your petitioner, which was affirmed by the supreme court of Illinois (Hill *v.* Harding, 93 Ill., 77), but reversed by the Supreme Court of the United States (Hill *v.* Harding, 107 U. S., 631). Said cause was thereupon remanded to said circuit court for further proceedings. Your petitioner was discharged as a bankrupt by said court of bankruptcy on September 15th, A. D. 1879, and
75 upon said cause being remanded to said circuit court presented to said circuit court a plea of said discharge in bankruptcy and asked leave to file the same, but said circuit court refused to permit said plea to be filed, and thereby denied your petitioner a right, privilege, or immunity which he claimed under the provisions of said bankrupt law. Your petitioner also demanded that the question whether or not he had been discharged as a bankrupt be tried by a jury, but said circuit court refused said demand and proceeded to try and tried said question without a jury, and thereby denied to your petitioner a right, privilege, or immunity which he claimed under the Constitution of the United States. Upon the fact of the discharge in bankruptcy of your petitioner being made to appear to the satisfaction of said circuit court,
76 your petitioner moved said circuit court to enter a judgment in his favor, but said circuit court denied said motion, and entered a judgment in said cause against your petitioner, and thereby deprived him of a right, privilege, or immunity which he claimed under the provisions of said bankrupt law; and your petitioner further shows that after the first judgment rendered in this cause had been reversed by the Supreme Court of the United States the supreme court of Illinois and said circuit court of Cook county did not in said cause proceed in harmony with the opinion of said Supreme Court of the United States in said cause, but proceeded contrary thereto, and in such a way as to deny to your petitioner the benefit of his discharge as a bankrupt under said bankrupt law. Your petitioner appealed from said several
77 acts of said circuit court, assigning for error, among other things, said acts of said circuit court, and these were the principal questions decided by the two appellate courts above mentioned, which involved a construction of certain laws of the United States, to wit, sections 5044, 5106, 5118, 5119 of the Revised Statutes of the United States, titled Bankruptcy; and of article "seven" of the amendments to the Constitution of the United States, and by the judgment of said supreme court of Illinois your petitioner was denied the benefit of the above-specified provisions of the laws and Constitution of the United States.

Your petitioner further shows that said supreme court of the State

of Illinois is the highest court of that State in which said questions and said cause could be decided, all of which will fully
78 and at large appear by reference to a copy of the record and proceedings in said cause in said last-mentioned court, and a certificate, under the hand of Hon. John H. Mulkey, the chief justice of said court, filed herewith as part of this petition.

Your petitioner respectfully submits that said supreme court of the State of Illinois erred in ratifying and approving said acts of said circuit court and in rendering the judgment rendered in this cause.

Your petitioner therefore prays that a writ of error may issue from this honorable court to the supreme court of the State of Illinois, and that the record of said judgment may be brought into this court and the manifest errors therein corrected, and that said judgment may be reversed; and, as in duty bound, will ever pray, &c.

GEORGE W. BRANDT,
Attorney for Petitioner.

79 UNITED STATES OF AMERICA, } ss:
Supreme Court of Illinois, }

In the Supreme Court of the State of Illinois.

GEORGE W. HILL, Plaintiff in Error,
v.
GEORGE F. HARDING, L. J. J. NISSEN, and WILLIAM H. BARNUM, Defendants in Error.

I, John H. Mulkey, chief justice of the supreme court of Illinois, hereby certify that the above cause was lately pending in said court; that George W. Hill, plaintiff in error, before judgment was rendered therein against him in the circuit court of Cook county, in this State, in which this case was originally commenced, claimed to have been adjudged a bankrupt under the act of Congress to establish a uniform system of bankruptcy throughout the United States, approved March 2d, A. D. 1867. He also moved said court before any
80 judgment was rendered against him therein to stay all further proceedings in said circuit court in said cause to await the determination of the court of bankruptcy on the question of his discharge as a bankrupt; that he based his motion on section twenty-one of said bankrupt act. He also claimed that the debt due from him to defendants in error, and which was the foundation of the judgment of said circuit court in this case, was one provable under said bankrupt law. Said circuit court refused to stay said proceedings and rendered a judgment against said Hill, which was affirmed by this court (Hill *v.* Harding, 93 Ill., 77), but reversed by the Supreme Court of the United States (Hill *v.* Harding, 107 U. S., 631). Said cause was thereupon remanded to said circuit court for further proceedings. Said Hill was discharged as a bankrupt by said court of bankruptcy on September 15th, A. D. 1879; and upon said cause being remanded to said circuit court
81 presented to said circuit court a plea of said discharge in

bankruptcy, and asked leave to file the same, but said circuit court refused to permit said plea to be filed, and thereby denied said Hill a right, privilege, or immunity which he claimed under the provisions of said bankrupt law. Said Hill also demanded that the question whether or not he had been discharged as a bankrupt be tried by a jury, but said circuit court refused said demand, and proceeded to try said question without a jury, and thereby denied to said Hill a right, privilege, or immunity which he claimed under the Constitution of the United States. Upon the fact of said discharge in bankruptcy of said Hill being made to appear to the satisfaction of said circuit court, said Hill moved said court to enter a judgment in his favor, but said circuit court denied said motion
82 and entered a judgment in said cause against said Hill, with perpetual stay of execution, and thereby said Hill was deprived of a right, privilege, or immunity which he claimed under the provisions of said bankrupt law. On the 25th day of January, A. D. 1886, said actions of said circuit court were ratified and approved by the supreme court of Illinois. Said supreme court of Illinois is the highest court of said State in which a decision in said suit can be had. Said acts of said circuit court above referred to were the principal questions in the cause and the ones upon which the decision in the case turned.

In witness whereof I have hereunto subscribed my — this 27th day of February, 1886.

JOHN H. MULKEY,
Chief Justice Sup. Court Ill.

83 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

GEORGE W. HILL, Plaintiff in Error,
v.
GEORGE F. HARDING, LAWRENCE J. J. NISSEN, and WILLIAM H. BARNUM, Defendants in Error.

And now comes said George W. Hill, plaintiff in error, by George W. Brandt, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1st. The supreme court of Illinois did not follow nor obey the opinion or decision of the Supreme Court of the United States in this case, but, on the contrary, proceeded hostile thereto and directed that the circuit court of Cook county, State of Illinois, should enter a judgment in this cause contrary to and in hostility with said decision and opinion.

2d. The circuit court of Cook county, State of Illinois, erred in denying to plaintiff in error leave to file his plea of his discharge in bankruptcy, and the appellate court for the first district of Illinois and the supreme court of Illinois erred in ratifying and approving said action of said circuit court.

84 3d. The circuit court of Cook county, State of Illinois, erred in refusing to permit the question of fact as to whether or not

plaintiff in error had been discharged as a bankrupt to be tried by a jury, and the appellate court of Illinois for the first district and the supreme court of Illinois erred in ratifying and approving said act of said circuit court.

4th. The circuit court of Cook county, State of Illinois, erred in denying the motion of plaintiff in error to enter judgment for him after the fact of his bankruptcy had been made to appear to the satisfaction of that court, and the appellate court for the first district of Illinois and the supreme court of Illinois erred in ratifying and approving said act of said circuit court.

5th. The circuit court of Cook county, State of Illinois, erred in denying the motion of plaintiff in error to enter a judgment releasing him from all liability subsequent to April 22d, A. D. 1878, on account of all causes of action involved in this suit, and the appellate court for the first district of Illinois and the supreme court of Illinois erred in ratifying and approving said act of said circuit court.

85 6th. The circuit court of Cook county, State of Illinois, erred in holding that there was a verdict in existence on which a judgment could be rendered in this case, and the appellate court for the first district of Illinois and the supreme court of Illinois erred in ratifying and approving said act of said circuit court.

7. The circuit court of the State of Illinois erred in rendering a judgment against plaintiff in error which might deprive him of a privilege claimed under a law of the United States, viz., the statute of the United States relating to bankruptcy, and the appellate court for the first district of Illinois and the supreme court of Illinois erred in ratifying and approving said act of said circuit court.

Wherefore said plaintiff in error prays that said action and judgments of said circuit court of Cook county, said appellate court, and said supreme court of the State of Illinois be reversed.

GEORGE W. BRANDT,
Attorney for Plaintiff in Error.

Endorsed on cover: Illinois supreme court. No. 253. George W. Hill, plaintiff in error, *vs.* George F. Harding, Lawrence J. J. Nissen, and William H. Barnum. Filed April 12, 1886.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1888.

NO. 253.

GEORGE W. HILL,
Plaintiff in Error,
vs.
GEORGE F. HARDING, WILLIAM H. BARNUM AND LAWRENCE J. J. NISSEN,
Defendants in Error.

Error to Supreme Court of Illinois.

STATEMENT.

This was an action of assumpsit, commenced on the 16th day of March, A. D. 1877, by defendants in error against plaintiff in error, in the Circuit court of Cook county, Illinois, to recover the value of certain legal services. The suit was commenced by attachment, founded on an affidavit of defendant in error Barnum, in which he stated that there was due defendants in error the sum of $8,264., and that plaintiff in error was "about fraudulently to conceal, assign or otherwise dispose of his "property or effects, so as to hinder or delay his creditors." (*Record, p. 2.*)

The statutes of Illinois, in the chapter relating to attachments, provide, among other things, as follows, viz:

§ 1. "That in any court of record having competent "jurisdiction a creditor may have an attachment against "the property of his debtor, or that of any one or more "of several debtors, when the indebtedness exceeds $20, "in any one of the following cases. * *Eighth*—Where "the debtor is about fraudulently to conceal, assign or "otherwise dispose of his property or effects, so as to "hinder or delay his creditors."

§ 2. "To entitle a creditor to such writ of attach- "ment, he or his agent or attorney shall make and file "with the clerk of such court an affidavit setting forth "the nature and amount of the indebtedness, after allow- "ing all just credits and set-offs, and one or more of the "causes mentioned in the preceding section, and also stat- "ing the place of residence of the defendants, if known, "and if not known, that upon diligent inquiry the affiant "has not been able to assertain the same." (Revised Statutes of Illinois, 1874, pp. 152–3.)

It was in pursuance of these sections of the statute that the attachment in the case at bar was issued. It was levied on certain property belonging to plaintiff in error. (*Record, p. 5.*) The attachment having been thus issued and levied, the property seized could, before the determination of the suit, be released from the levy in either of two ways only, for which the statute provided as follows:

§ 14. "The officer serving the writ shall take and re- "tain the custody and possession of the property attached, "to answer and abide by the judgment of the court, un- "less the person in whose possession the same is found "shall enter into bond and security to the officer, to be "approved by him in double the value of the property so "attached, with condition that the said estate and prop-

"erty shall be forthcoming to answer the judgment of "the court in said suit. The sheriff or other officer shall "return such bond to the court in which the suit is "brought on the first day of the term to which such at- "tachment is returnable."

§ 15. "Any defendant in attachment desiring the re- "turn of the property attached, may at any time, except "in term time, at his option, instead of, or in substitution "for the bond required in the preceding section, give like "bond and security, in a sum sufficient to cover the debt "and damages sworn to in behalf of the plaintiff, with all "interest, damages and costs of suit, conditioned that the "defendant will pay the plaintiff the amount of the judg- "ment and costs which may be rendered against him in "that suit, on a final trial, within ninety days after such "judgment shall be rendered. In term time, a recogni- "zance, in substance as aforesaid, may be taken in open "court and entered of record, in which case the court "shall approve of the security and the recognizance made "to the plaintiff, and upon a forfeiture of such recogni- "zance, judgment may be rendered and execution issued "as in other cases of recognizance. In either case *the* "*attachment shall be dissolved* and the property taken "restored, and all previous proceedings, either against the "sheriff or against the garnishees set aside, and the cause "shall proceed as if the defendant had been seasonably "served with summons." (Revised Statutes of Illinois, 1874, p. 154.)

Plaintiff in error chose to avail himself of the provisions of said section *fifteen*, and having procured two sureties, who were willing to assume such an obligation as was therein contemplated, he, as principal, together with Horace M. Singer and Thomas B. Rice, as sureties, en-

tered into a recognizance conditioned for the payment of "the judgment and costs, which may be rendered against "him (Hill) *in this suit* on a final trial thereof," etc., and the attachment was thereupon dissolved. (*Record, p. 5.*)

The attachment law of Illinois further provides, as follows:

§ 27. "The defendant may plead, traversing the facts "stated in the affidavit upon which the attachment issued, "which plea shall be verified by affidavit, and if, upon "the trial thereon, the issue shall be found for the plain- "tiff, the defendant may plead or demur to the action as "in other cases, but if found for the defendant, the at- "tachment shall be quashed," etc.

On the 18th day of April, 1877, in pursuance of the foregoing section, plaintiff in error filed a plea, properly verified by affidavit, traversing the facts stated in the affidavit for attachment as cause why the attachment should issue, and denying the fraud charged therein. On the 26th day of May, 1877, this plea was on motion of defendants in error stricken from the files. (*Record, pp. 10, 11.*)

Afterwards, and on the 17th day of March, 1878, before the jury trial of this case commenced, plaintiff in error moved the Circuit court to reinstate this plea, and for leave to contest the grounds on which the attachment was issued. But the Circuit court refused said motion, and plaintiff in error excepted. (*Record, p. 19.*)

The case was thereupon tried on the plea of the general issue, and on the 12th day of April, 1878, a verdict of $3,500. in favor of defendants in error was rendered. Plaintiff in error thereupon moved for a new trial on the ground that the court erred in refusing him leave to contest the grounds on which the writ of attachment issued.

Pending the motion for new trial, and on the 1st day of May, 1878, plaintiff in error was on his own petition adjudged a bankrupt by the District court of the United States, for the Northern District of Illinois.

On the 7th day of May, 1878, plaintiff in error filed in this cause and in said Circuit court a certificate of said bankruptcy. (*Record, p. 22.*)

Afterwards, and on the 11th day of May, 1878, before any other proceedings were had in this case, plaintiff in error, having given defendants in error one day's notice in writing, in that behalf, suggested to said Circuit court and on the record thereof, said bankruptcy of said plaintiff in error, and moved said Circuit court to stay all further proceedings in said cause, to await the determination of said court in bankruptcy on the question of the discharge of plaintiff in error as a bankrupt. On the hearing of said motion plaintiff in error presented to said Circuit court, without objection, the certificate of the register in bankruptcy, showing the bankruptcy of plaintiff in error, and it not being denied or questioned that plaintiff in error had been adjudged a bankrupt as aforesaid, the motion for a stay of proceedings was argued and decided on the basis that said fact of bankruptcy did exist. (*Record, pp. 22–3.*)

The Circuit court denied said motion for stay of proceedings and also overruled the motion for new trial, and on said 11th day of May, 1878, eleven days after plaintiff in error had been adjudged a bankrupt, rendered a general judgment against him for $3,500 and costs of suit. To all of which plaintiff in error duly excepted. (*Record, pp. 18–23.*) This judgment was affirmed by the Appellate court for the First district of Illinois, and also by the Supreme court of Illinois. (*Hill* v. *Harding, 93 Ill., 77.*)

Hill thereupon prosecuted a writ of error from this last decision to the Supreme court of the United States. This latter court reversed the judgment of the Supreme court of Illinois (*Hill* v. *Harding*, *107 U. S., 631*), holding that the motion for a stay of proceedings should have been granted, and settling the law of this case in that regard.

After this judgment of the Supreme court of Illinois was so reversed, defendants in error, in the absence of plaintiff in error, and without notice to him or any one representing him, procured the Supreme court of Illinois to order the Appellate court for the First district of Illinois to reverse the judgment of the Circuit court in this case, and direct the Circuit court that "upon it satisfac- "torily appearing that the appellant (Hill) has since the "rendition of the verdict in said cause received his dis- "charge in bankruptcy, it enter a judgment in favor of "the plaintiffs (defendants in error), and against the "said defendant (Hill) upon the verdict heretofore "entered in this cause, with a perpetual stay of execution," and said Appellate court thereupon entered such order. (*Record, p. 26.*)

On November 24th, A. D. 1883, defendants in error filed a copy of this order in the Circuit court, and thereupon said court ordered said cause to be reinstated in said Circuit court and redocketed therein. (*Record, p. 27.*) Thereupon immediately afterwards plaintiff in error presented to the Circuit court a plea of his discharge as a bankrupt on September 15th, A. D. 1879, from all debts which existed on April 22, 1878, and asked leave to file the same, but the court refused to permit said plea to be filed, and plaintiff in error excepted. (*Record, pp. 27-8.*)

And thereupon immediately afterwards defendants in

error presented to the court what purported to be a certificate of the discharge of plaintiff in error as a bankrupt, dated September 15, 1883, from all debt which existed against him on April 22, 1878. This was attested under the hand of one "WM. H. BRADLEY, *clerk*," but was not otherwise proved. (*Record, p. 29.*) Plaintiff in error objected to the trial of any question of fact in the case without a jury, and demanded a jury trial of the question whether he had been discharged as a bankrupt. But the court overruled said objection and demand, and plaintiff in error duly excepted. (*Record, p. 29.*) Plaintiff in error also objected to the reception in evidence of said paper so attested by said Bradley because it should be presented to a jury, and not a judge without a jury, and also because it was not properly authenticated or proved, there being no certificate of the presiding judge to the same as required by law nor sufficient evidence of its genuineness, but the court overruled said objections and received said paper in evidence, and plaintiff in error duly excepted. This paper was the only evidence offered or received showing, or tending to show, that plaintiff in error had been discharged in bankruptcy. (*Record, p. 30.*)

And, thereupon, immediately upon the reception of said paper as evidence plaintiff in error moved said court to enter a judgment in this case in favor of plaintiff in error and against defendants in error, but the court denied said motion and plaintiff in error duly excepted. (*Record, p. 30.*)

And, thereupon, immediately afterwards plaintiff in error moved said court to enter a judgment in this case in favor of plaintiff in error and against defendants in error, releasing plaintiff in error from all liability subsequent

to April 22, 1878, on account of all causes of action involved in this suit, but the court overruled said motion, and plaintiff in error thereupon duly excepted. (*Record, p. 31.*) And, thereupon, said Circuit court entered judgment in this case against plaintiff in error for $3,500, with perpetual stay of execution. (*Record, pp. 24, 31.*)

This judgment was on June 25, 1884, affirmed by the Appellate court of the First district of Illinois (*Record, p. 35*), and on January 25, 1886, it was affirmed by the Supreme court of Illinois (*Record, p. 39*), *Hill* v. *Harding*, 116 Ill., 92. Plaintiff in error brings the case again to this court for review and assigns the following errors:

Errors Assigned.

1st. The Supreme court of Illinois did not follow nor obey the opinion or decision of the Supreme court of the United States in this case, but, on the contrary, proceeded in hostility thereunto, and directed that the Circuit court of Cook county, State of Illinois, should enter a judgment in this case, contrary to and in hostility with said decision and opinion.

2d. The Circuit court of Cook county, State of Illinois, erred in denyng to plaintiff in error leave to file his plea of his discharge in bankruptcy, and the Appellate court for the First district of Illinois, and the Supreme court of Illinois erred in ratifying and approving said action of said Circuit court.

3d. The Circuit court of Cook county, State of Illinois, erred in refusing to permit the question of fact as to whether or not plaintiff in error had been discharged as a bankrupt, to be tried by a jury and the Appellate court

of Illinois for the First district, and the Supreme court of Illinois erred in ratifying and approving said act of said Circuit court.

4th. The Circuit court of Cook county, State of Illinois, erred in denying the motion of plaintiff in error to enter judgment for him after the fact of his bankruptcy had been made to appear to the satisfaction of that court, and the Appellate court for the First district of Illinois, and the Supreme court of Illinois, erred in ratifying and approving said act of said Circuit court.

5th. The Circuit court of Cook county, State of Illinois, erred in denying the motion of plaintiff in error to enter a judgment releasing him from all liability subsequent to April 22d, A. D. 1878, on account of all causes of action involved in this suit, and the Appellate court for the First district of Illinois, and the Supreme court of Illinois, erred in ratifying and approving said act of said Circuit court.

6th. The Circuit court of Cook county, State of Illinois, erred in holding that there was a verdict in existence, on which a judgment could be rendered in this case, and the Appellate court for the First district of Illinois, and the Supreme court of Illinois, erred in ratifying and approving said act of said Circuit court.

7th. The Circuit court of the State of Illinois erred in rendering a judgment against plaintiff in error, which might deprive him of a privilege claimed under a law of the United States, viz: the statute of the United States relating to bankruptcy, and the Appellate court for the First district of Illinois, and the Supreme court of Illinois, erred in ratifying and approving said act of said Circuit court.

Brief of Authorities.

The courts of Illinois proceeded in hostility to the decision of the Supreme court of the United States in this case, and erred in refusing plaintiff in error leave to file a plea of his discharge in bankruptcy, and in entering a judgment against him for the purpose of depriving him of the benefit of his discharge as a bankrupt.

Page v. *Russell*, 2 Maule & Sel., 551.
Taylor v. *Mills*, Cowper, 525.
Paul v. *Jones*, 1 Durn. & East, 599.
Welsh v. *Welsh*, 4 Maule & Sel., 333.
Buel v. *Gordon*, 6 Johnson, 126.
Woodward v. *Herbert*, 24 Maine, 358.
Ellis v. *Ham*, 28 Maine, 385.
Hankin v. *Bennett*, 8 Wels., Hurl. & Gor., 107.
Hinton v. *Acraman*, 2 Manning, Granger & Scott, 367.
Eastman v. *Hibbard*, 54 New Hamp., 504.
McMullen v. *Bank of Penn. Township*, 2 Pa. St., 343.
Coke v. *Lewis*, 8 Pa. St., 493.
Wells v. *Mace*, 17 Vt., 503.
Emery v. *Clarke*, 2 J. Scott, N. S., 582.
Comfort v. *Eisenbeis*, 11 Pa. St., 13.
Haddens v. *Chambers*, 2 Dallas (Pa.) 236.
Page v. *Cole*, 123 Mass., 93.
Carpenter v. *Turrell*, 100 Mass., 450.
Hamilton v. *Bryant*, 114 Mass., 543.

Barnstable Savings Bank v. *Higgins*, 124 Mass., 115.
Dermy v. *Merrifield*, 128 Mass., 228.
Lincoln v. *Leshure*, 132 Mass., 40.
McKay v. *Funk*, 37 Iowa, 661.
Bratton v. *Anderson*, 5 South Carolina, 504.
National Bank of Clinton v. *Taylor*, 120 Mass., 124.
Payne v. *Able*, 7 Bush, (Ky.) 344.
Martin v. *Kilbourn*, 12 Heiskell (Tenn.) 331.
Odell v. *Wootten*, 38 Georgia, 224.
Wolf v. *Stix*, 9 Otto, (99 U. S.), 1.
Empire Fire Ins. Co., v. *Real Estate Trust Co.*, 1 Bradwell, 391.
Drake v. *Drake*, 83 Ill., 526.

Sureties are favorites in law, and no intendments will be made against them.

Law v. *East India. Co.*, 4 Vesey, 824.
Lang v. *Pike*, 27 Ohio St., 498.
Kingsbury v. *Westfall*, 61 New York, 356.
Stull v. *Hana*, 62 Ill., 55.
People v. *Tompkins*, 74 Ill., 486.
Pickersgill v. *Lahens*, 15 Wallace, 140.
Risley v. *Brown*, 67 New York, 160.
Weaver v. *Shyrock*, 6 Serg. & Rawle (Pa.), 362.
Ranstone v. *Parr*, 3 Russell, 539.
Kennedy v. *Carpenter*, 2 Wharton, (Pa.), 362.
Other v. *Iveson*, 3 Drewry, 177.

Town v. *Ammidown*, 20 Pick., 535.
Wood v. *Fish*, 63 New York, 245.

A surety is under no moral obligation to pay the debt of his principal.

Winston v. *Fenwick*, 4 Stew. & Post, (Ala.), 269.
Harrison v. *Field*, 2 Washington, (Va.), 136.
Pecker v. *Julius*, 2 Browne, (Pa.), 31.
Van Derveer v. *Wright*, 6 Barb., (N. Y.), 547.

The Circuit court erred in trying the case out of its regular order.

Fisher v. *Nat. Bank of Commerce*, 73 Ill., 34.
Angel v. *Plume & Atwood Manf. Co.*, 73 Ill., 412.
Griswold v. *Shaw*, 79 Ill., 449.
Sea v. *Glover*, 1 Bradwell, 335.
Brown v. *Davis*, 3 Bradwell, 639.
Kilian v. *Clark*, 9 Bradwell, 426.

The Circuit court erred in admitting in evidence the alleged certificate of Hill's discharge in bankruptcy.

Baldwin v. *Hale*, 17 Johnson, 272.
Griswold v. *Sedgwick*, 1 Wendell, 126.
1 Greenleaf on Evidence, § 514.
Brackett v. *The People*, 64 Ill., 170.

There was no verdict on which a payment could be entered.

Boynton v. *Ball*, 105 Ill., 627.

ARGUMENT.

I.

THE COURTS OF ILLINOIS DID NOT OBEY THE DECISION OF THE SUPREME COURT OF THE UNITED STATES, BUT PROCEEDED IN HOSTILITY THERETO, AMONG OTHER THINGS, BY REFUSING PLAINTIFF IN ERROR LEAVE TO PLEAD HIS BANKRUPTCY, AND BE THEREUPON DISCHARGED AND ENTERING A JUDGMENT AGAINST HIM, THE OBJECT OF WHICH WAS TO DEPRIVE HIM OF THE BENEFIT OF HIS DISCHARGE AS A BANKRUPT.

When this case was first in the Supreme court of Illinois, plaintiff in error alleged as a reason why a new trial should be granted, that the court below had refused to permit him to litigate the grounds upon which the attachment issued, as he had a right to do if the proceeding retained any of the features of a proceeding *in rem*. Concerning this point the learned Supreme court of Illinois said:

"The recognizance entered into by appellant (plaintiff "in error) and his sureties in this case was in strict con- "formity with the provisions of the statute just cited, and "when so taken and approved by the court and the order "dissolving the attachment was duly entered, the char- "acter of the suit as a proceeding *in rem was thereby* "*completely changed. The suit thereupon became a pro-* "*ceeding in personam as completely as if it had been orig-* "*inally commenced by an ordinary summons*, and no attach- "ment had ever been sued out; and the qualified lien

"which appellees (defendants in error) acquired by the "levy was forever gone. This being so, no possible good "could have resulted from such an inquiry as to whether "the attachment was properly or improperly sued out. "Suppose the plea had been restored, and an issue formed "thereon had been tried and found in favor of appellant, "what judgment could the court have rendered thereon? "Certainly not 'that the writ of attachment be quashed,' "for that was no longer before the court. The attach- "ment was already dissolved, and the writ itself was not "only *functus officio*, but its previous effect and operation "*were completely annihilated* by the entering into and ap- "proval of the recognizance, and the order dissolving the "attachment; and such a judgment, therefore, would "have been an idle, useless ceremony, without any effect "whatever upon the suit in question." (*Hill* v. *Harding et al.*, 93 Ill., 81.)

After deciding that the giving of the recognizance divested the case at bar of all features of an attachment suit or proceeding *in rem*, and left it the same as if it had been commenced by summons only, the learned Supreme court of Illinois, with strange inconsistency, in deciding the question whether the proceedings should have been stayed took precisely the opposite view. The learned court went on in its opinion and established to its satisfaction that an attachment levied more than four months before the bankruptcy of the defendant therein would not be dissolved by such bankruptcy, and that the plaintiff in the suit would have a right to proceed notwithstanding such bankruptcy. It then in effect held that the liability of the sureties in the recognizance should be made available to the attaching creditors the same as the property would have been if the attachment had not been dissolved,

and it affirmed the judgment on the principle that the sureties should be held so liable and for the purpose of holding them so liable.

The learned court said: "But it may be urged that in "the present case the suit has ceased to be an attachment "proceeding. That is true; but the same principle which "forbids a stay of proceedings in attachment cases applies "with equal force to the case at bar. The security for "the judgment which the plaintiffs were seeking to "recover could only have been made available by the "actual rendition of the judgment," etc. (*Hill* v. *Harding et al.*, 93 Ill., 88.)

In order to escape one horn of the dilemma the learned court held that the suit was divested of all attachment features, and in order to escape the other horn, held that the suit was an attachment proceeding to the extent at least, that it should be governed by the same rules which the learned court thought should govern an attachment proceeding, and that the liability of the sureties should be made to answer the same purpose the attached property would have done had not the attachment been dissolved. The learned court, wholly ignoring the fact that the sureties in the recognizance were not sureties for the debt which plaintiff in error owed defendants in error, but treating the case as if they were such sureties, affirmed the judgment in order to charge them with the payment of the debt, saying, "the bankrupt act *was not* "*intended* to relieve third parties of just liabilities to the "creditors of the bankrupt, and it should not be so con- "stued as to give it that effect." (*Hill* v. *Harding et al.*, "93 Ill., 88.)

The effect of all of this is that the Supreme court of Illinois thought that defendants in error had the same

equitable right to get their money, that they would have had if a forthcoming bond had been given for the attached property or no steps had been taken to dissolve the attachment, and the learned court declared the law to fit the case. The subsequent proceedings in this case demonstrate the fact that the learned court is still of the same opinion, notwithstanding the law has been declared to be otherwise by the Supreme court of the United States, and the above view of the Supreme court of Illinois overthrown and reversed in this very case.

When the giving of a bond to release the attached property was presented to plaintiff in error and his sureties, two courses were open to them. The one, the giving of a forthcoming bond; in which case the grounds upon which the attachment issued might be litigated and the attachment defeated, but if not, the attached property would be liable for the debt. The other, the giving of a recognizance to dissolve the attachment; in which case the grounds upon which the attachment issued could not be litigated, the proceeding became one *in personam* merely, and the bankruptcy of the debtor before final judgment would discharge him and his sureties from all liability for the debt. They chose the latter form of procedure and are entitled to all its incidents. Ignoring the fact that these two modes of releasing attached property are entirely different, and have different incidents; the learned Supreme court of Illinois held in effect that the means taken to free the attached property was a recognizance to dissolve the attachment so as to prevent plaintiff from litigating the grounds upon which the attachment issued and that it was also a forthcoming bond so as to prevent the bankruptcy of plaintiff in error from availing him. In short that it was anything and everything which

would hold plaintiff in error liable for this debt, notwithstanding his bankruptcy.

Before the case at bar was decided by the Supreme court of the United States there was some conflict of authority on the question here under discussion. A few courts held the same view that the Supreme court of Illinois did in the case at bar, and that the law should be made to fit the case and relieve the supposed hardship. The great majority of the courts which had passed upon the question, and those of the greatest authority, held that in such a case as the one at bar the bankruptcy of the debtor before final judgment, entirely released him and his sureties from all further liability for the debt. This latter view, and the cases holding it, were adopted by the Supreme court of the United States in its decision of this case, and has ever since been the law of this case, which cannot be evaded or set at naught by any device whatever.

It is very clear that defendants in error, when they procured the Supreme court of Illinois to order a judgment against plaintiff in error, with perpetual stay of execution, thought that such judgment would compel the sureties in the recognizance to pay the debt from which plaintiff in error had been discharged, and that was, no doubt, the intention with which the order was entered. Defendants argued in the Supreme court of Illinois that the judgment, with perpetual stay of execution, did bind the sureties in this case to pay the judgment, and cited authorities to sustain the proposition. (*Hill* v. *Harding*, 116 Ill., 94.) If it does so bind the sureties, then it is settled, it is believed, without conflict of authority, that plaintiff in error will be liable over to his sureties, and thus be deprived of the benefit of his discharge in bankruptcy.

The above proposition is thoroughly well established. The sureties in the recognizance were never liable for the *debt* which Hill owed defendants in error, nor were they liable on any contingent demand which defendants in error had against Hill. The whole of their liability rested upon the *contingency, whether there would ever be a demand* by defendants in error against Hill. This being so, if the sureties are compelled to pay this debt, Hill will be obliged to repay them, and his discharge in bankruptcy will be nugatory.

Under the older bankrupt laws which contained no provisions for sureties, and persons contingently liable for debts of the bankrupt, proving them against his estate, it was universally held that the surety who after the bankruptcy of the principal, paid the debt for which he was liable, could, notwithstanding the bankruptcy of the principal, recover indemnity from him, because the right of action against the principal and in favor of the surety arose at the time he paid the debt. The following among many cases hold this:

Page v. *Bussell*, 2 Maule & Sel., 551.
Taylor v. *Mills*, Cowper, 525.
Paul v. *Jones*, 1 Durn. & East, 599.
Welsh v. *Welsh*, 4 Maule & Sel., 333.
Buel v. *Gordon*, 6 Johnson, 126.

The English bankrupt law of 6 Geo. 4, c. 16, and the United States bankrupt laws of 1841 and 1867, all contained provisions for the proving of claims by sureties *for the debt*, who had not yet paid the same, and for the proof of contingent claims against the estate of the bankrupt. It appears from an inspection of these laws and from the decisions of the courts hereinafter referred to, that the

provisions in all these laws with reference to this matter were substantially identical. Decisions under any one of them, therefore, are in point as to all. Under all these laws a distinction has been taken and is well and fully established between a contingent demand and a contingency whether there will ever be a demand. In the latter class of cases, the bankruptcy of the principal does not release him from liability to indemnify his sureties when their liability is established by a contingency which happens after his bankruptcy. The case at bar is one of this class of cases; as a reference to the authorities will clearly demonstrate.

In *Woodward* v. *Herbert*, 24 Maine, 358, a debtor was arrested on mesne process, and gave a bond, in common form, to procure his release from arrest; the surety in the bond then filed his petition, under the United States bankrupt act of 1841, and was declared a bankrupt; next, judgment was rendered in the action, and the bond became forfeited by the neglect of the principal to perform the condition thereof. Held, the certificate of the discharge of the surety in bankruptcy furnished no defense to a suit against him on the bond. The Court, among other things, said:

"The fifth section of the act (of 1841) to establish a "uniform system of bankruptcy provided that 'all credi- "tors whose debts are not due and payable until a future "day, all annuitants, holders of bottomry, and responden- "tia bonds, holders of policies of insurance, sureties, in- "dorsers, bail, and other persons having uncertain and "contingent demands against such bankrupt, shall be per- "mitted to come in and prove such debts or claims, under "this act, and shall have a right, when their debts and "claims become absolute, to have the same allowed them.'

" This clause was probably designed to embrace such " debts or claims as the statute of 6 Geo. 4, c. 16, §§ 51, 53, " 56, had authorized to be proved under an English com- " mission. The fifty-sixth section of that act provided " 'that if any bankrupt shall, before the issuing of the " commission, have contracted any debt, payable upon a " contingency which shall not have happened before the " issuing of such commission, the person with whom such " debt has been contracted, may, if he think fit, apply to " the commissioners to set a value upon such debt, and the " commissioners are hereby required to ascertain the value " thereof, and to admit such person to prove the amount " so ascertained, and to receive dividends thereon.'

" It has been decided that by the words 'any debt pay- " able upon a contingency,' it was intended to include ac- " tual contingent debts only, and not a mere personal " obligation, imposing no debt or duty which can be esti- " mated or valued. *Ex parte Lancaster Canal Company*, " 1 Mont. R., 44; *Lyde* v. *Mann*, 1 Coop. Sel. Ca., 123. " In the latter case the bankrupt had covenanted to charge " an annuity upon any property which might come to him " by his wife's death. He became a bankrupt and, " obtained his certificate. After that his wife died and left " him an annuity. The decision was that his certificate " could not be pleaded in bar to the covenant. Lord " BROUGHAM said, 'it is impossible to treat this as a con- " tingent debt; it is, in truth, *no debt at all; it is a mere* " *personal obligation to do a certain thing in a most un-* " *certain event*.' He inquired how it was possible to " ascertain the value of it, and remarked, 'it is plainly " not at all like a debt payable upon a contingency which " forms the subject of that section.'

" In the act of Congress the word demand is used, in-

" stead of the word debt. But apparently without any " design to enlarge the class of such contingent claims, for " the word debt is used as a synonym in the same clause, " when speaking of the right to prove 'such debts or " claims under this act.' The same rule of construction " would seem, therefore, to be applicable to the act of " Congress. Had the plaintiff any actual demand of a " contingent character against French at the time when " he was decreed a bankrupt? * *It is necessary to dis-* " *tinguish between a contingent demand and a contingency* " *whether there will ever be a demand.* * The cases of " *ex parte Baker*, 9 Ves., 110, and of *Taylor* v. *Young*, " 3 B. & A., 521, although they did not arise under the " statute of 6 Geo. 4, c. 16, show that the penal sum of a " bond, conditioned to pay or do an act *upon the happening* " *of an uncertain event*, cannot alone be considered such " a contingent debt or demand as is contemplated in the " bankrupt acts."

In *Ellis* v. *Ham*, 28 Me., 385, A became the surety of B on his bond as constable, in March, 1840. During the same month B levied an attachment on certain property, and in October, 1843, judgment was rendered against B for damages occasioned by an official neglect of duty in connection with the attachment. In January, 1843, B was declared a bankrupt under the bankrupt law of 1841. Suit was brought against A, as surety of B in the above matter in 1844, and in 1845 A paid the amount thus claimed of him, and sued B for indemnity. Held, B was liable, and his bankruptcy was no defense. The court, among other things, said: "The plaintiff (A), when " the petition was filed, had no claim which could be " proved against the defendant (B) in bankruptcy. There " was then no proof that the defendant had not faithfully

"discharged all of his official duties. There was no con-
"tingent debt due from the defendant to the plaintiff.
"*There was only a contingency or possibility that such a*
"*claim or debt might exist at some future time.* Such a
"claim could not be proved or discharged under the act
"of Congress."

In *Hankin* v. *Bennett*, 8 Wels., Hurl. & Gor., 107, the defendant (A), as surety, entered into a bond conditioned that if he should pay to the plaintiff such costs as he should in due course of law be liable to pay, in case the verdict should pass for the then defendant in an action pending which had been brought by one C, in the name of the plaintiff, the bond was to be void. The action mentioned in the condition was a *scire facias* on a judgment obtained by the plaintiff, and which had been assigned to C by T. H., since deceased, of whom the plaintiff was executor. The action was tried at the spring assizes in 1848, when a verdict was found for the defendant. In the following Easter term, a rule *nisi* for a new trial was obtained. On the 14th of November following a fiat in bankruptcy issued against the defendant (A). In Hiliary Term, 1849, the rule for a new trial was discharged. On May 29, 1849, the defendant obtained his certificate, and on August 22, 1849, the costs were taxed. Held, that at the time the fiat issued, the defendant's (A's) liability, under the bond, was a mere contingent liability, and not a contingent debt within the bankrupt act—6 Geo. 4, c. 16, S. 56—and the plaintiff's claim for the costs was not barred by the defendant's (A's) certificate. MARTIN, B., in deciding the case, among other things, said: "It was argued, how-
"ever, that the liability contained in the condition of the
"bond was a debt payable upon a contingency within the
"6 Geo. 4, c. 16, S. 56, (the bankrupt act which was in

"force at the time when the fiat was issued against the "defendant), and that it was probable under the fiat, and "the demand therefore barred. We think, however, that "this liability was not *a debt* at all within the true mean- "ing of the section. It was a contract to indemnify a "nominal plaintiff, whose name was used by a third per- "son, against such costs as the plaintiff might become "liable to pay to the defendant in the suit, should the "latter obtain judgment in his favor. It seems to us im- "possible to consider this *a debt*. It is a mere contingent "liability, but not a contingent debt."

In *Hinton* v. *Acraman*, 2 Manning, Granger & Scott, 367, a principal gave bond with sureties conditioned that they would pay such sum or sums as should be recovered in any action or actions which then had been, or should thereafter be commenced for the recovery of a debt alleged to be due from the principal, or that the principal would render himself to the jailer of the court in which such action had been, or might be brought after judgment should be recovered, in such action or actions. After the making of the bond, but before a judgment was recovered for the debt, the principal became bankrupt, and this was pleaded as a defense to a suit on the bond. Held, it was no defense. TINDALL, C. J., in deciding the case, among other things, said: "The original debt in this "case is undoubtedly barred; but it will not follow, as a "necessary consequence, that a bond given to secure the "payment of the debt will be also barred. * We must, "therefore, look to the provisions of 6 G. 4, c. 16, to de- "termine the point."

The court then referred to the 51st and 56th sections of that act, and, speaking of the last mentioned section, continued: "In the construction of this section, a dis-

"tinction has been taken (in the case of *ex parte* Mar-"shall, 1 Mont. and Ayr., 145, cited, and relied upon by "ERSKINE, J., in *Abbott* v. *Hicks*, 5 N. C., 578, 7 Scott, "733), *between contingent liabilities which may never be-"come debts*, and debt payable on a contingency; and it "has been held that the latter only are provable under "the commission. The present case, although in form "a case of debt on a bond, yet the bond being defea-"sible on performance of the condition, it is in sub-"stance not the case of a contingent debt, but a con-"tingent liability. *At the time when the fiat issued, it "was quite uncertain whether any debt would ever "arise upon the bond;* it was at that time a liability "which would not become a debt unless the condition "were broken,"

In *Eastman* v. *Hibbard*, 54 New Hampshire, 504, it was held that a discharge under the bankrupt act of 1867 was no bar to a suit against a surety on a bond executed before the bankruptcy to secure the plaintiff for such damages as might be occasioned him by an injunction staying the collection of an execution, when the equity proceeding in which the injunction was issued was not determined till after the discharge. In the course of the decision the court said: "Section 19 of the act of 1867 is "to the same general purpose as section 5 of the bank-"rupt act of 1841 and the English act of 6 Geo. 4, c. 16, "namely, to provide for the proof of contingent debts and "demands. Cases decided under the provisions of those "acts may therefore be considered as in point."

To a similar effect also see:

McMullen v. *Bank of Penn Township*, 2 Pa. St., 343.

Coke v. *Lewis*, 8 Pa. St., 493.

Wells v. *Mace*, 17 Vermont, 503.
Emery v. *Clarke*, 2 J. Scott (N. S.), 582.
Comfort v. *Eisenbeis*, 11 Pa. St., 13.
Haddens v. *Chambers*, 2 Dallas (Pa.), 236.

In *Page* v. *Cole*, 123 Mass., 93, the Supreme court of Massachusetts, speaking of the judgment entered by the court below in a case and under circumstances similar to those in the case at bar, when the first and general judgment in this case was in existence, said: "It had no "more power to enter a judgment as of a former day, the "effect of which would be to hold the sureties on the "bond to dissolve the attachment to render the bankrupt "liable to his sureties for such sum as they might pay "notwithstanding his discharge, *and thus practically to* "*prevent his discharge from operating on his debt*, than it "had to enter a judgment as of the day on which the or-"der was made," etc.

This case of *Page* v. *Cole* is cited and approved by the Supreme court of the United States in the case at bar (*Hill* v. *Harding*), 107 U. S. (17th Otto), 631, and is, it is submitted, conclusive authority, if further authority was necessary on this point.

It is thus fully established that if the sureties in the recognizance to dissolve the attachment are compelled to pay this judgment, Hill will be liable over to them for the sums they have to pay. He will, in that event be deprived of the benefit of his discharge in bankruptcy. He will then owe the debt to his sureties instead of to defendants in error. In such case it is clear that the stay of execution was a mere idle form of no benefit to Hill, and left him in no better position than if a general execution had issued against him, for he will be subject to such execution at the suit of his sureties.

The question whether or not the judgment against Hill with perpetual stay of execution binds the sureties to the payment of the debt, is directly presented to this court by the record herein for the reason just stated. It was directly presented to the Supreme court of Illinois by the same record, but that court evaded deciding it by saying that if the action of the Circuit court followed the directions which it, the Supreme court of Illinois gave in its remanding order, the judgment must be affirmed. (*Hill* v. *Harding*, 116 Ill., 97.) This court of last resort, is not, however, bound by any direction which the Supreme court of Illinois gave its subordinate tribunals, and will, no doubt, see to it that the law as declared in the opinion already rendered in this case is obeyed not only by the inferior tribunals, but also by the Supreme court of Illinois.

The learned Supreme court of Illinois also said that it would not decide this question of the liability of the sureties in the case, because the sureties were not before the court, and whatever it might hold in that regard would be mere dictum, *Hill* v. *Harding*, 116 Ill., 99.

Hill was, however, before that court, and he is before this court, and it is submitted that it was then and is now necessary to decide this question, because it is one which vitally affects him on the facts presented by this record. If the question is presented by this record, and is vitally necessary to a decision of the rights of plaintiff in error, it should be decided, even though the decision may be used as authority in other cases. The object of reporting cases is that the decisions may be used as authority in other cases. It is certainly a novelty in jurisprudence for a court to refuse to decide a question presented by the record in a case, and vitally affecting the parties, be-

cause some other person, not a party to the record, is or may be interested in the question.

If this judgment does bind the sureties, and thus as fully bind Hill to his payment, then it is erroneous as being in the very teeth of the bankrupt law and contrary to the decision of the Supreme court of the United States in this case, and should, for that reason alone, most certainly be reversed.

Defendants in error evidently intend to insist that the judgment against Hill with perpetual stay of execution does bind the sureties in recognizance to the payment of the amount of that judgment. It seems to be their idea that by the idle form of staying the execution against Hill they can deprive him of the benefit of the bankrupt law, and that they can thus indirectly accomplish what the law has peremptorily forbidden them from accomplishing directly. They seem to think they can juggle with the law, and evade its letter and spirit by so shallow a device as seeming to obey it while they in fact set it at defiance. The law cannot, however, be trifled with in this manner.

It is confidently submitted that the judgment against Hill with perpetual stay of execution, does not bind the sureties in the recognizance to dissolve the attachment to the payment of anything. The recognizance into which they entered only bound them to pay a judgment *valid against Hill, and which he was bound to pay*, but which remained for ninety days unpaid. This seems on principle too clear for argument. The sureties are bound by the same recognizance that binds Hill. The words as to all of them are the same. If *he* is not bound to pay this judgment, how can *they* be bound? To hold him not liable, and them liable, would be to make the same con-

tract binding all the obligors equally by the same words speak a different language when applied to the different obligors, and to distinguish against sureties, who are everywhere favorites in law. It would be, not to enforce the contract which the parties have made, but to make one for them in spite of them, and against their will, and to make a different one for each. The statement of the proposition is its refutation. Direct and conclusive authority, however, is not wanting on this point.

The attachment laws of Massachusetts, with reference to the dissolution of attachments, are substantially in words and in legal effect identical with those of Illinois on the same subject, as a reference to them will demonstrate. The Massachusetts statute, so far as pertinent, is as follows, viz:

§ 122. "A person or corporation whose goods or es-
" tate are attached on mesne process in any civil action
" may at any time, before final judgment, dissolve such
" attachment by giving bond with sufficient sureties to be
" approved," etc. "With condition *to pay the plaintiff*
" *the amount, if any, that he may recover within thirty*
" *days after the final judgment in such action.*" (Revised Statutes of Massachusetts, p. 935, chap. 161, § 122.)

The Illinois statute is as follows, viz:

§ 15. "Any defendant in attachment, desiring the re-
" turn of property attached, may, at any time except in
" term time, at his option, instead of or in substitution for
" the bond required in the preceding section, give like
" bond and security, in a sum sufficient to cover the debt
" and damages sworn to in behalf of the plaintiff with all
" interest, damages and cost of suit, conditioned that the
" defendant *will pay the plaintiff the amount of the judg-*
" *ment and costs which may be rendered against him in that*

"*suit, on a final trial, within ninety days after such judg-*
"*ment shall be rendered.* In term time a recognizance
" in substance as aforesaid, may be taken in open court,
" and entered of record, in which case the court shall
" approve of the security and the recognizance made to
" the plaintiff, and upon a forfeiture of such recognizance
" judgment may be rendered and execution issued, as in
" other cases of recognizance. In either case, the attach-
" ment shall be dissolved, and the property taken restored,
" and all previous proceedings, either against the sheriff
" or against the garnishees set aside, and the cause shall
" proceed as if the defendant had been seasonably served
" with a writ of summons."

It thus appears that the legal obligation of the principal and sureties in the bond and recognizance under the Massachusetts and Illinois statutes is identical. Decisions, therefore, construing the Massachusetts statute are directly in point, and when, as in deciding this case, they have been approved by the court of last resort, they are conclusive.

In *Carpenter* v. *Turrell*, 100 Mass., 450, an attachment was levied on property of the defendants which was dissolved by a bond given by the defendants and sureties. More than four months afterwards, the defendants "filed " their petition in bankruptcy, and suggested on the record " the pendency of the bankruptcy proceeding." At the trial of the case before a judge without a jury, "the plaint-" iffs requested the judge to find for them, to the end that " a special judgment for the plaintiffs might be entered, " and the plaintiffs thereby enabled to avail themselves of " the bond given to dissolve the attachment." The court refused to do this, and held that the bankruptcy proceedings were a bar to the further prosecution of the suit. In

this, it was sustained by the Supreme court, which, speaking through WELLS, J., said: "The plaintiffs contend that "the bond is a mere substitute for the attachment, and "therefore, that it should stand in all respects as its pre- "cise equivalent. But such is not the purport of the bond, "nor the intention of the statute which authorizes it to be "given. It does not merely restore the possession of the "property to the debtor, subject to the attachment; it dis- "solves the attachment utterly. It is not given for the "property itself nor as security for its value; but for "the payment absolutely of the judgment when recovered "in the suit, whatever may be its amount. It is, in many "respects, a higher and better security for the creditor "than the attachment. It is not liable to be discharged by "the insolvency or death of the debtor, nor by any facts "which might dissolve the attachment without defeating "the suit. This is shown by the cases cited upon the "brief for the plaintiffs. The bond, although a substitute "for the attachment, is not its equivalent, and has not its "incidents. The provision of the bankrupt act, which "preserves liens and attachments cannot, therefore, have "any application to it. The plaintiffs also rely upon the "provision of the bankrupt act which continues the liability "of sureties and other parties collaterally bound, notwith- "standing the discharge of their principal. But we under- "stand that provision to apply to persons who *are liable* "*for the debt of the bankrupt, which existed before, and is* "*discharged by the proceedings in bankruptcy.* This bond "was not such a debt. It does not become of the nature "of a debt until the contigency arises upon which it is to "be made operative, to wit: *a judgment valid against the* "*principal, and which he is bound to pay, but which re-* "*mains for thirty days unpaid.* The obligation of the

" principal himself is merely collateral to the suit. Until " judgment, the bond bears a relation to the actual debt " not unlike that of a replevin or bail bond, recognizance " with sureties upon appeal. They are incident to the " legal proceedings, and follow the result of the suit. If " the plaintiff become nonsuit, the debt would not be dis- " charged, but the bond would be. So, when judgment is " rendered for the defendant upon the plea of a discharge " in bankruptcy, the bond is discharged, not by the pro- " ceedings in bankruptcy, but by the determination of the " contingency upon which the obligation of the bond is " made to depend."

This was the leading case on the subject of the main questions involved in the case at bar decided by the Supreme court of Massachusetts. It was followed and amplified by many other decisions, a detailed reference to all of which does not seem necessary. Attention is, however, invited to a few of them, as illustrating the whole.

In *Hamilton* v. *Bryant*, 114 Mass., 543, the real estate of the defendant was attached on July 12, 1870, in a suit commenced that day. At the September term, 1871, there was a verdict for the plaintiff, to which exceptions were taken, but waived in October, 1872. June 14, 1872, the defendant filed his petition in bankruptcy and was duly adjudged a bankrupt, and January 25, 1873, obtained his discharge in bankruptcy and pleaded it in the suit. After filing the defendant's petition in bankruptcy and the adjudication thereon, and before his discharge he gave, July 22, 1872, a bond with sureties to dissolve the attachment. It will be observed that the bond to dissolve the attachment was given about ten months after the verdict in the case was rendered, and more than a month after the defendant was adjudged a bankrupt.

The plaintiff moved the court below to enter a special judgment to be enforced by action upon the bond against the defendant and his sureties, and this the court did, and the defendant appealed. The Supreme court held that no special judgment could be entered to charge the sureties, and reversed the special judgment, and, among other things, said:

"This case cannot be distinguished from *Carpenter* v. "*Turrell*, 100 Mass., 450. It was there held that a dis- "charge in bankruptcy was a bar to the further prosecu- "tion of a suit against the bankrupt commenced by "attachment more than four months before the com- "mencement of the bankruptcy proceedings, if the attach- "ment was dissolved by giving bond under the Gen. Sts., c. "123, § 104, notwithstanding the provisions in the Bank- "rupt Act of 1867, c. 176, §§ 14–33, preserving the lien "of an attachment made four months or more before the "commencement of the bankruptcy proceedings, and con- "tinuing the liability of sureties after the discharge in "bankruptcy of their principal. The facts in the pres- "ent case differ from those in the one cited only in this, "that here the attachment continued in existence until "after the defendant was adjudged a bankrupt, while in "that the attachment had been dissolved by giving bond "previous to such adjudication. Here, as in that case, the "bond does not become of the nature of a debt until the "contingency arises on which it is to be made operative, "to wit, *a judgment against the principal, which he is* "*bound to pay*, and which for thirty days remains unpaid. "As we cannot now render judgment against the princi- "pal the bond is discharged by the determination of the "contingency upon which the obligation of the bond is "made to depend."

The case of *Page* v. *Cole*, 123 Mass., 93, was a suit on a contract, commenced by attachment. "On the same "day personal property of the defendant was attached, "and on the next day the defendant gave a bond with "sureties to dissolve the attachment." The case was tried before a judge without a jury, and he found the issues for the plaintiff. On the following day the defendant filed a motion for new trial, which might have been heard on November 6th. Counsel for the plaintiff induced the judge to fix November 9th as the day for hearing the motion. The defendant's counsel, having been notified of this fact only an hour before the time fixed for the hearing, came into court and insisted that the argument of the motion should be put over to the next day. This was resisted by counsel for the plaintiff, on the ground that the motion for new trial was frivolous, and the object sought by the delay was to enable the defendant to go into bankruptcy and thus defeat the suit. The court, however, granted the delay asked.

"On the next day, before the hour appointed, the de-"fendant filed his voluntary petition in bankruptcy, in the "United States District court, and was duly adjudged a "bankrupt, and before the hour fixed for said hearing on "said motion for a new trial, a suggestion of the defend-"ant's bankruptcy was filed in the case, and the usual "motion was made in open court for a continuance of the "cause. The plaintiff's counsel resisted this motion, and "asked for judgment as of November 6th. The defendant's "counsel contended that the court could not properly and "legally enter a judgment. No decision was made upon "this motion, but the hearing upon the motion for a new "trial proceeded and was argued by the respective coun-"sel. The judge took these several matters under ad-

" visement, and on December 4, 1876, overruled the mo-
" tion for a new trial, and ordered judgment for the
" plaintiff as of November 6th. To this order of judgment
" and refusal to continue the case, the defendant alleged
" exceptions." The court, speaking by MORTON, J., after quoting the section now under consideration in full, proceeded:

" The object of this provision is not only to protect
" the bankrupt, to prevent his being harassed by suits
" while the question of his discharge is pending, and to
" enable him to plead his discharge in bar of the debt,
" but also to enable the assignee to come in and defend
" the suit. *Ray* v. *Wright*, 119 Mass., 426, and cases
" cited. *National Bank of Clinton* v. *Taylor*, 120 Mass.,
" 124. In the case at bar, before judgment was entered,
" the defendant was duly adjudged a bankrupt, and on
" the same day filed in the suit a suggestion of his bank-
" ruptcy, and made application to the court to have the
" case stayed to await the determination of the question
" of his discharge. After this application, the Superior
" court had no power to proceed further in the suit. It
" had no more power to enter a judgment as of a former
" day, the effect of which would be to hold the sureties
" on the bond to dissolve the attachment, to render the
" bankrupt liable to his sureties for such sum as they
" might pay notwithstanding his discharge, and thus
" practically to prevent his discharge from operating
" upon this debt, than it had to enter a judgment as of
" the day on which the order was made. The court can-
" not take into consideration the fact that the defendant
" obtained a delay by a frivolous motion for a new trial.
" The provision of the bankrupt act is peremptory that
" upon the application of the bankrupt the suit shall be

"stayed to await the determination of the court of bank-
"ruptcy, on the question of his discharge. The order
"of the Superior court, that judgment be entered as of
"a former day, was therefore erroneous."

The foregoing was the sole point decided in *Page* v. *Cole*. The device there attempted to hold the sureties to an obligation to which they never consented, was to enter judgment as of a former day. In the case at bar the device attempted by defendants in error is to enter a judgment which the principal is not bound to pay, and then force the sureties to pay it. It is respectfully submitted that this device is infinitely more futile than the one attempted in *Page* v. *Cole;* and cannot be any more successful.

The law with reference to this subject having been thus settled by repeated decisions of the Supreme court, the Legislature of Massachusetts, in the year 1875, passed the following statute, viz:

"SECTION 1. Whenever any defendant, in a civil ac-
"tion, dissolves an attachment made in said suit, by giv-
"ing bond as provided by the statutes of this common-
"wealth, and has already been, or afterwards is adjudged
"a bankrupt, the court may, at any time, upon motion, if
"it appears that the plaintiff is otherwise entitled to judg-
"ment in said action, enter a special judgment for the
"plaintiff to enable him to proceed against the sureties,
"upon the bond given to dissolve the attachment; and
"said judgment, within the meaning of said statutes, to
"enable the plaintiff to maintain an action against the
"sureties on said bond, no other objection existing thereto;
"provided, the attachment, for the dissolution of which
"said bond was given, was not made within four months

" next preceding the commencement of proceedings in " bankruptcy.

" SECTION 2. No bond shall hereafter be given to dis- " solve an attachment in a civil action, unless it contains, " in addition to the conditions now required by law, a fur- " ther condition obliging the sureties to pay to the plain- " tiff, within thirty days after the entry of any special " judgment, in accordance with the preceding section, " the sum, if any, for which said judgment shall be en- " tered."

Approved March 23, 1875.

Massachusetts Session Laws of 1875, p. 467.

There was never any such law as this, nor anything similar to it, in existence in Illinois; on the contrary, from long before the inception of the proceedings in this case, continuously to the present time, the law of Illinois has been the same on this subject as the law of Massachusetts was before the enactment of the above statute.

After this law was passed, several cases were decided by the Supreme court of Massachusetts which bear directly on the questions presented in the case at bar, two of which are now referred to.

In *Barnstable Savings Bank* v. *Higgins*, 124 Mass., 115, suit was commenced June 30, 1875, and property of the defendant attached. January 8, 1876, he was adjudged a bankrupt, and August 23, 1876. obtained his discharge. July 21, 1876, the attachment was dissolved by a bond for that purpose given by the defendant, and sureties containing " in accordance with the provisions of the St. of 1875, " c. 68, § 2, a condition obliging the sureties to pay to the

" plaintiff the amount of any special judgment." A special judgment was entered in pursuance of this statute and of the bond. The defendant appealed, the principal ground of error alleged being that the statute was unconstitutional as being in conflict with the bankrupt act of the United States. The opinion of the court was delivered by Mr. CHIEF JUSTICE GRAY, who, among other things, said:

" An attachment on *mesne* process made more than four " months before the commencement of proceedings in " bankruptcy, creates a lien on the property attached, " which is preserved by the bankrupt act; and the court " in which the action is pending may award such judg- " ment and execution as are necessary to give effect to " this lien, and as are authorized by the laws of the com- " monwealth, and not expressly or by implication pro- " hibited by the act of Congress. U. S. Rev. Sts., § 5044. " *Doe* v. *Childress*, 21 Wall., 642. The court may, there- " fore, after the defendant has obtained a certificate of " discharge in bankruptcy, render a special judgment " against the property held under such an attachment. " *Davenport* v. *Tilton*, 10 Met., 320. *Bates* v. *Tappan*, " 99 Mass., 376. *Ray* v. *Wight*, 119 Mass., 426.

" In the case of the dissolution of such an attachment " by giving bond under the statutes of the commonwealth " and of the principal obligor's obtaining a certificate " of discharge in bankruptcy, *the court could not*, before " the St. of 1875, c. 68, render a special judgment for the " plaintiff for the purpose of charging the sureties; *be-* " *cause the condition of such a bond, under the Gen. Sts., c.* " *123, § 104, was only to pay the judgment recovered* " *against the principal, and which he was bound to pay,* " but which remained for thirty days unpaid. *Carpenter*

" v. *Turrell*, 100 Mass., 450. *Hamilton* v. *Bryant*, 114
" Mass., 543. *Braley* v. *Boomer*, 116 Mass., 527.

"But the St. of 1875 expressly authorized the court,
" when the defendant has dissolved, by giving bond, an
" attachment made four months before the commence-
" ment of proceedings in bankruptcy, and has been or is
" afterwards adjudged a bankrupt, to enter a special judg-
" ment for the plaintiff, to enable him to proceed against
" the sureties on the bond; and required the bond to con-
" tain a condition that the sureties shall, within thirty days
" after the entry of such special judgment, pay to the
" plaintiff the sum for which the judgment is entered.
" *This statute applies only to bonds given since it took effect.*
" *Fickett* v. *Durham*, 119 Mass., 159."

Here the same judge who delivered the opinion of the Supreme court of the United States in the case at bar in terms decided, that on an obligation conditioned precisely as that of the sureties in the case at bar, the court had no power to render a special judgment to charge the sureties. A special statute was necessary to confer such power, and that only applied to bonds given after its enactment.

The case of *Denny* v. *Merrifield*, 128 Mass., 228, bears directly on the main question in this case, and is a very clear exposition of the duty of courts to *enforce* the law as the legislature has made it, and not to *make* the law as they think the legislature should have made it. The case was this:

" The debt sued on was a valid debt due from the de-
" fendant to the plaintiff. The action was commenced on
" January 31, 1878, by an attachment of the defendant's
" property, which was sufficient, and the attaching officer
" had in his hands, when this action was entered, money

"enough to pay the plaintiff's claim in full. On Febru-
"ary 21, 1878, the defendant filed his petition in bank-
"ruptcy in the District court of the United States, for the
"district of Massachusetts, but no hearing was ever had
"on the petition, nor was the defendant ever adjudged a
"bankrupt, nor an assignee of his estate chosen. At
"the time of filing his petition in bankruptcy, the de-
"fendant also filed, under the U. S. St. of June 22,
"1874, § 17, an offer of composition," which was ac-
cepted by the requisite majority of his creditors, and fully carried out by the defendant, who tendered the plaintiff his share of the composition, which the plaintiff refused to accept.

"On April 16, 1878, the defendant filed with the clerk
"of the court a bond, with sureties approved by the
"plaintiff's attorney, to dissolve the attachment, the con-
"dition of which was that the defendant should, within
"thirty days after the final judgment in such action, pay
"to the plaintiff the amount, if any, which he should re-
"cover, and the sureties should also, within thirty days
"after the entry of any special judgment in such action,
"pay to the plaintiff the sum, if any, for which such
"judgment should be entered; and the officer surrendered
"the property attached, to the defendant. * The
"plaintiff contended that he was entitled to a judgment
"against the defendant, or a judgment against the prop-
"erty attached, or a special judgment, or such a judg-
"ment as would entitle him to proceed against the sure-
"ties on the bond. But the judge ordered judgment for
"the defendant."

Mr. Chief Justice GRAY, in delivering the opinion of the Court on this state of facts, said.

"The U. S. St. of June 22, 1874, § 17, allows a cred-

" itor holding collateral security for his debt to share in " the proceedings of composition only to excess of the " debt above the security, or upon surrendering the secu- " rity for the benefit of the estate; and makes the compo- " sition binding upon all debts, whether secured or un- " secured, which are duly described in the statement of " the debtor, and are of such a nature that they would be " barred by a certificate of discharge in bankruptcy. " *Mudge* v. *Wilmot*, 124 Mass., 493; *Leggett* v. *Barton*, " 11 Vroom, 83. The composition, followed by payment " or tender of the sums due according to it, therefore, " discharged the defendant from personal liability to the " plaintiff, and the plaintiff is not entitled to a general " judgment.

" As no assignment in bankruptcy was ever made, the " proceedings did not discharge the plaintiff's attachment, " and would not have prevented the plaintiff, if the prop- " erty attached had remained subject to the lien created " by the attachment, from taking special judgment against " the property, for the purpose of giving effect to that " lien. *Ray* v. *Wight*, 119 Mass., 426; *Sage* v. *Heller*, " 124 Mass., 213; *Alsop* v. *White*, 45 Conn., 499.

" But the attachment having been dissolved, and the " property surrendered to the defendant, upon giving bond " for the payment of any judgment recovered in the ac- " tion, the property attached is no longer bound by the " attachment, and consequently no special judgment " against the property can be entered.

" The remaining question is, whether a special judg- " ment can be given for the plaintiff, *for the purpose of* " *charging the sureties on that bond.* If the bond had been " in the ordinary form of a bond to dissolve an attachment " such as was in use in this commonwealth before the

"passage of the St. of 1875, *c.* 68, no special judgment "could have been rendered. The plaintiff's rights, there- "fore, depend upon the construction of this statute. "*Barnstable Savings Bank* v. *Higgins*, 124 Mass., 115, "and cases cited.

"Proceedings for a composition under the act of Con- "gress of 1874 may be had at any time after the filing of "a petition in bankruptcy, 'whether an adjudication in "bankruptcy shall have been had or not'; and, as already "stated, do not, unless there has been an assignment in "bankruptcy, dissolve attachments, though made within "four months before the filing of the petition. The St. of "1875, *c.* 68, passed nine months later, authorized the "entry of a special judgment for the purpose of charging "the sureties on a bond given to dissolve an attachment, "only in cases in which both the defendant 'has already "been or afterwards is adjudged a bankrupt'; and the "attachment is 'not made within four months next prece- "ding the commencement of proceedings in bankruptcy.' "This statute cannot, consistently with its explicit pro- "visions, be construed to include cases like that before us "in which there has been no adjudication of bankruptcy, "nor assignment in bankruptcy, nor attachment made "more than four months before the filing of the petition.

"If we were sitting *as legislators*, we might yield to the "suggestion that the *reasons are no less strong* for allow- "ing such a special judgment to be entered in every case "in which proceedings in bankruptcy are had for the "distribution of a debtor's property among his creditors, "and for his discharge from his debts by way of compo- "sition, than in a case in which he is adjudged a bank- "rupt, and the subsequent dealings are in the ordinary "form; and in a case in which the attachment, though

"made within four months before the commencement of "proceedings in bankruptcy, fails to be dissolved, because "no assignment in bankruptcy is made, than in one in "which, notwithstanding such an assignment, the attach- "ment remains in force because made more than four "months before the commencement of such proceedings. "But *sitting as judges*, we cannot extend the statute by "construction to cases which, though they may appear to "be *within its reason*, do not satisfy the conditions clearly "prescribed and defined by its language. *Jacob* v. *United* "*States*, 1 Brock, 520; *Denn* v. *Reid*, 10 Pet., 524, 527; "*Putnam* v. *Longley*, 11 Pick., 487, 490."

In further illustration of this principle see *Lincoln* v. *Leshure*, 132 Mass., 40.

As already stated, no such statute as the one passed in Massachusetts in 1875, ever existed in Illinois. The statute in existence at the time the sureties in the case at bar became bound does not bind them to pay this judgment, nor does the obligation they assumed. Defendants in error will, in this court, probably fail in obtaining the judicial legislation they seek to make a contract for the sureties in this case to which they never assented, and then enforce it against them.

The first judgment rendered in this case was a *general one* against Hill. The Supreme court of Illinois held that judgment valid, because if the proceedings were stayed till the bankrupt was discharged, the recognizance of the sureties could not be enforced, and the debt would be lost. That Court said: "He is not in such case bound to wait "till the bankrupt is discharged. To compel him to do "so would be to force him to pursue a course *which would* "*result in the loss of his debt.* * If the attaching cred- "itor who commenced proceedings more than four

" months before the commencement of proceedings in " bankruptcy is compelled to suspend all further proceed- " ings in his attachment suit, and quietly stand by till the " *bankrupt obtains his discharge, and thereby completely* " *destroys his right of action*, so that he cannot recover a " judgment at all, how much better off is he than the " attaching creditor who sued out his attachment within " four months? No better. * The security for the " judgment which the plaintiffs were seeking to recover " could only have been made available *by the actual ren-* " *dition of the judgment. To have stayed the proceed-* " *ings until the defendant obtained his discharge*, would " *have been in effect to have deprived him* of his security " altogether—in short, a loss of his claim." (*Hill* v. *Harding et al.*, 93 Ill., 88, 89.)

The reason upon which the Supreme court of Illinois based its decision that the proceedings ought not to have been stayed, was that if Hill was discharged in bankruptcy before judgment, recourse against the sureties would be utterly gone. This decision of that court is, if law, conclusive that the judgment in the case at bar, rendered on the basis that Hill had before been discharged in bankruptcy, and which does not directly bind him, does not bind the sureties in the recognizance. It had not at that time occurred to the defendants in error, that after Hill was discharged in bankruptcy, they could evade his discharge by any device. They therefore stoutly argued that unless the general judgment entered against Hill before he was discharged in bankruptcy, was sustained, they could not hold the sureties, and their debt would be lost. The Supreme court of Illinois agreed with them in that view, which was, of course, the true and only view. That general judgment was not sustained, but was reversed.

Defendants in error, with astonishing versatility, have changed their ground and claim that sustaining the general judgment was a matter of no moment, and that the sureties are bound to pay a judgment which does not bind Hill, and which was rendered against him after he was discharged in bankruptcy.

Judge GRAY, in delivering the opinion of the Supreme Court of the United States in the case at bar, among other things, said: "The stay does not operate as a "bar to the action, but only as a suspension of proceed- "ings until the question of the bankrupt's discharge shall "have been determined in the United States court sitting "in bankruptcy. After the determination of that ques- "tion in that court the court in which the suit is pending "may proceed to such judgment as the circumstances of "the case may require. If the discharge is granted, the "court in which the suit is pending may then determine "whether the plaintiff is entitled to a special judgment "for the purpose of enforcing an attachment made more "than four months before the commencement of the pro- "ceedings in bankruptcy, or for the purpose of charging "sureties upon a bond given to dissolve such an attach- "ment. * There is no occasion to consider the ques- "tion (which may perhaps depend upon the statutes or "the practice of the State) whether it will be within the "authority of the court in which the suit is pending, now "that the defendant has obtained his discharge in bank- "ruptcy, to render a special judgment in favor of the plaint- "iffs for the purpose of charging the sureties on the bond "given to dissolve the attachment; or any other ques- "tion which may hereafter arise upon the production by "the defendant of his certificate of discharge, or upon the "suggestion of the assignee in bankruptcy." (*Hill* v. *Harding*, 107 U. S. (17 Otto), 631.)

Defendants in error, in the courts below, contended that this language of Judge Gray authorized the State court to take any steps it saw proper to charge the sureties in the recognizance, and implied that any steps it might take which would accomplish that end would be allowable. It is hardly necessary to say that this contention of defendants in error is wholly without foundation to support it.

The views of Judge Gray on this subject, as above shown, are not a matter of doubt or dispute. He had repeatedly held in cases involving precisely the same question as the one at bar, that the sureties in the obligation to dissolve an attachment could not be held by any device whatever. He was, from his long service as judge of the Supreme Court of Massachusetts, familiar with the decisions of that state, and with the special statute of 1875, passed expressly to cover such a state of facts as exists in the case at bar. He had, as such judge, rendered decisions construing that special law. He, presumably, did not know whether such a law existed in Illinois, as that question was not mooted in this case in the Supreme Court of the United States. Having such special statute in mind, and not knowing but such, or a similar statute existed in Illinois, he used the language above quoted.

This language was not intended as judicial legislation in favor of defendants in error, nor as an authorization to the State court to make a contract for the sureties into which they never entered, nor to confer any power on the State court which it did not have before the language was used. The use of that language conferred no power on the State court which it had not before, and took away from it no power which it previously possessed.

The court merely observes that it will be within the province of the State court to act in the premises, as the circumstances of the case, the statutes and practice of the state, and the paramount law of the United States, might demand. This the State court would have done without the observation. As already shown, the opinion of Judge Gray, and of the Supreme court of the United States, is that, under the circumstances of this case, the sureties in the recognizance cannot be bound by any judgment or device whatever.

Among other cases illustrating the subject under consideration and in a line with the Massachusetts cases and the decision of this court in *Hill* v. *Harding*, 107 U. S., 631, the following may perhaps be profitably referred to:

In *McKay* v. *Funk*, 37 Iowa, 661, it was held that no personal judgment could be rendered against a defendant after he had been adjudicated a bankrupt. And it was held to be error to enter a judgment in such a case with an order that no execution should issue pending the determination of the question of discharge. The court said: "After the motion was filed, *nothing ought to have* "*been done further than the entering of an order staying* "*proceedings*. But a judgment was rendered, which, "however, was not to be enforced by execution till the "further order of this court. *The law was not followed*, "and the judgment against defendant, personally, was "therefore erroneous, and must be reversed."

The foregoing case is cited and approved by Judge GRAY in delivering the opinion in the case at bar.

In *Bratton* v. *Anderson*, 5 South Carolina R., 504, where a judgment had been rendered by a court of the state, which was not a lien, and pending proceedings to

make it a lien, the defendant went into bankruptcy, it was held that it was the duty of the State court immediately upon application of the defendant to suspend all further proceedings in the case.

In *National Bank of Clinton* v. *Taylor*, 120 Mass., 124, after a default had been entered against a defendant, he was adjudged a bankrupt, and filed in the case a copy of the adjudication in bankruptcy and a motion for a continuance. "The motion for a continuance was opposed "by the plaintiff, but the presiding judge ruled that the "court had no discretion, but was required by the bank-"rupt act to continue the case, bankruptcy having been "suggested in proper form before final judgment, and "ordered the case to be continued." Afterwards the defendant obtained his discharge in bankruptcy, *which he then pleaded in bar of the suit, and judgment was thereupon entered in his favor.*

Both these cases are cited and approved by Judge GRAY in delivering the opinion in the case at bar.

In *Payne* v. *Able*, 7 Bush. (Ky.), 344, three suits were instituted against Able in which attachments were levied on his property, in two of which bonds were given, which had the effect of dissolving the attachments, as in the case at bar, and in the other a forthcoming bond was given. Able afterwards went into bankruptcy and was discharged, and pleaded his discharge in the cases. The plaintiffs asked for a rule on the sureties in the bonds aforesaid, to pay them the amount of the debts, to secure which the attachments had been levied. This the court refused to do, and the Supreme court said concerning it: "We are also of the opinion that the court properly re-"fused the rule against the sureties on the attachment "bonds. The act of Congress, it is true, provides that 'no

"discharge granted under this act shall release, discharge "or affect any person liable for the same debts, for or "with the bankrupt, either as partner, joint contractor, "indorser, security or otherwise.' But the sureties on the "attachment bonds were *never liable for the debts*, and "did not contract to pay the same, or any portion of "them. In two of the bonds they agreed and understood "that the defendant, Able, should *perform the judgments* "*of the court*; and in the other, that the attached property "or its value, should be 'forthcoming, and subject to the "order of the court for the satisfaction of such judgment.' "No judgments were, *or could have been rendered against* "*Able*, and hence *the contingencies upon which they were* "to become liable as sureties, have not arisen, and cannot "now arise."

In *Martin* v. *Kilbourn*, 12 Heiskell (Tenn.), 331, a judgment was rendered by a justice of the peace on a note, and the defendant appealed, and gave an appeal bond, conditioned that he would "prosecute his appeal with "effect, otherwise comply with and perform the judgment "of the court." In the Circuit court the defendant pleaded a discharge in bankruptcy, upon which judgment was rendered in his favor. Held that the surety on the appeal bond was discharged, and no judgment could be rendered against him. The court said: "We know of "no principle on which judgment could be rendered "against the surety, unless there is something in the "bankrupt law which controls the case. It is provided "by the bankrupt law that no discharge of the bankrupt "shall release, discharge or affect any person liable for "the same debt, either as partner, joint-contractor, en-"dorser, security or otherwise. Martin never was *liable* "*on the debt* with Allen, in any character. The appeal

" vacated the judgment, and Martin was only liable *in the* " *event judgment should be rendered* against Allen in the " Circuit court. This was not done. On the contrary, " Allen prosecuted his appeal with effect, and Martin was " no longer liable on his bond. *Able* v. *Payne*, 7 Bush., " 344."

In *Odell* v. *Wootten*, 38 Georgia, 224, the principal in an appeal bond went into bankruptcy after the appeal was taken, and was discharged, and the question was whether this did not discharge the surety in the appeal bond. The court held that, as no judgment was rendered against the principal, the surety was not bound, and proceeded:

" But it is insisted by counsel for plaintiff in error, that " the act of Congress, known as the bankrupt act, Sec. " 33, is the paramount law on this subject, and that it " enacts that the discharge of the principal, as a bankrupt, " shall not discharge the security. A careful perusal of " the act will show that this applies only to a surety who " contracted to become liable *for the payment of the debt*, " and not *for the payment of the judgment* to be entered " in a particular action then pending. Its language is 'no " discharge granted under this act shall release, discharge " or affect any person liable for the same debt, for or " with the bankrupt, either as partner, joint-contractor, " indorser, security or otherwise.' This clearly contem- " plates a a case where the security contracts to become " liable with the principal *for the payment of the debt.* " This same act (Sec. 21), which under the Constitution " of the United States is, we admit, the paramount law on " this subject, declares that no creditor, whose debt is " provable under this act, shall be allowed to prosecute " any suit at law or in equity, to final judgment against " the debtor, after he is adjudged a bankrupt, until the

" question of his discharge has been determined. Again, " it is declared in Sec. 54, that the discharge duly granted " under this act shall, with the exceptions aforesaid (which " do not apply in this case), release the bankrupt from all " debts, claims, liabilities and demands which were or " might have been proved against his estate in bankruptcy. " Wooten's contract, when he signed the appeal bond, was " *to pay the judgment* that might be entered in that case. " His principal was afterwards adjudged a bankrupt, and " discharged as such. And the paramount law says, *as* " *the claim was provable in bankruptcy, that the principal* " *shall be absolutely released from the debt*, and that no " judgment shall ever be entered in the case. Upon this " state of facts we hold that Wooten, the security on the " appeal, has complied with his contract, and his liability " ceases."

All the three cases from which quotations have last been made concur in the view, that where the liability of the surety is *not for the debt*, but *for a judgment which may or may not thereafter be rendered*, he is discharged by the bankruptcy of the principal. The principle involved in the case of an appeal bond, and in the case of a bond given to dissolve an attachment, is precisely the same. The liability in both cases is for a judgment which may or may not thereafter be rendered against the principal. In *Carpenter* v. *Turrell*, 100 Mass., 450, before referred to, the court, in terms, likens the bond to dissolve the attachment to an appeal bond; and in *Martin* v. *Kilbourn*, 12 Heiskel (Tenn.), 331, which was a case on an appeal bond, *Payne* v. *Able*, 7 Bush, 344, which was a case on a bond to dissolve an attachment, is cited as an authority in point.

The principle upon which all these cases proceed has

been fully and in terms approved by the Supreme court of the United States. In *Wolf* v. *Stix*, 9 Otto, (99 U. S.) 1, the question under consideration was the liability of sureties on a bond where the principal, in legal effect, purchased the interest of certain creditors in goods which had been attached, and with his sureties agreed to pay such creditors $10,000, if upon the trial of the suit in which the attachment issued, it should appear that they had any interest to sell. The opinion was delivered by Mr. CHIEF JUSTICE WAITE, who, among other things, said:

"Sect. 5,118, Rev. Stat., provides that 'no discharge "shall release, discharge, or affect any person liable for "the same debt for or with the bankrupt either as part- "ner, joint contractor, indorser, surety or otherwise.' "The cases are numerous in which it has been held, and "we think correctly, that if one is bound as surety for "another to pay any judgment that may be rendered in "a specified action, if the judgment is defeated by the "bankruptcy of the person for whom the obligation is "assumed, *the surety will be released.* The obvious rea- "son is that the event has not happened on which the lia- "bility of the surety was made to depend. Of this class "of obligations are the ordinary *bonds in attachment suits* "*to dissolve an attachment, appeal bonds*, and the like."

The attention of the court is particularly invited to the point that in the class of cases holding that under facts such as those of the case at bar, the proceedings should not be stayed, it was always either conceded or decided that if the proceedings were stayed till the defendant was discharged the sureties could not be held liable, and the stay was denied on that ground. This point, as already shown, was in terms decided by the Supreme court of

Illinois, when it refused the stay on the first hearing. The class of cases holding that the proceedings must be stayed, all hold that the discharge of the defendant releases the sureties. So that as to this point the authorities are unanimous that the discharge of the defendant releases the sureties, and they cannot be held by any judgment or device.

If this case had been commenced by summons only, and no attachment had been issued, and the sureties in the recognizance had entered into a voluntary bond of the same obligation as the recognizance, could it be successfully contended that judgment should have been entered in the case simply for the purpose of charging them? Yet that case is in no legal aspect different from this. They were bound by the terms of their obligation alone, and the cause which induced them to assume it was wholly immaterial. The only proper inquiry, so far as they are concerned, is, what is the obligation?

The court will never strain a point to hold mere sureties liable; on the contrary, it will seize hold of every circumstance in their favor.

It is a general rule, without exception, that sureties are favorites of the law, have a right to stand upon the strict terms of their obligations, and that no intendments will be made against them. In *Law* v. *The East India Company*, 4 Vesey, 824, the court said: "Where any act "has been done by the obligee that may injure the surety, "the court is very glad to lay hold of it in favor of the "surety." In *Lang* v. *Pike*, 27 Ohio St., 498, the court said: "No principle is more firmly settled in this state "than this: that sureties may stand *on the very terms of* "*a statutory bond or undertaking*. So clearly has this "doctrine been announced and acted upon that it may be

"regarded *as entering into the condition of such an under-*
"*taking*, that it will not be extended by the courts beyond
"the necessary import of the words used." In *Kingsbury* v. *Westfall*, 61 New York, 356, the court said:
"It is now too well settled to admit of doubt that a guar-
"antor, like a surety, is bound only by the strict letter or
"precise terms of the contract of his principal, whose
"performance of it he has guaranteed; that he is in this
"respect a favorite of the law, and that a claim against
"him is *strictissimi juris*."

This rule has been many times announced and acted upon by the Supreme court of Illinois. In *Stull* v. *Hance*, 62 Ill., 55, WALKER, J., said: "The contract of a surety
"is strictly construed, and his liability is never extended
"beyond the terms of his agreement, or at least its mani-
"fest purport. *In case of doubt, the doubt is generally, if*
"*not universally, solved in his favor*." In *The People* v. *Tompkins*, 74 Ill., 486, SCHOLFIELD, J., said: "No prin-
"ciple of law is better settled than that the contract of a
"surety is to be construed strictly, and his liability can-
"not be extended by implication beyond the terms of his
"obligation. As observed by STORY, J., in *Miller* v.
"*Stewart et al.*, 9 Wheaton, 680: 'To the extent and in
"the manner and under the circumstances pointed out in
"his obligation he is bound, and no further.' *Reynolds* v.
"*Hall et al.*, 1 Scam., 35; *People, etc.* v. *Moon*, 3 *id.*, 123;
"*Governor, etc.*, v. *Ridgway*, 12 Ill., 14; *C. & A. R. Co.*
"v. *Higgins et al.*, 58 *id.*, 128; *Smith* v. *Peoria County*,
"39 *id.*, 425."

It has often been held, and is unquestioned law, that a surety is under no moral obligation to pay the debt of his principal:

Winston v. *Fenwick*, 4 Stew. & Port. (Ala.), 269.

Harrison v. *Field*, 2 Washington (Va.), 136.
Pickersgill v. *Lahens*, 15 Wallace, 140.
Pecker v. *Julius*, 2 Browne (Pa.), 31.
VanDerveer v. *Wright*, 6 Barb. (N. Y.), 547.

If the surety in a joint obligation dies, the remedy against his estate is gone at law, and equity will not, in the absence of fraud or mistake, charge it. If all the joint obligors are principals, and participate in the consideration, a court of equity will enforce the obligation against the estate of the deceased obligor, because the reasonable presumption is that the parties intended the obligation to be joint and several, but through fraud or mistake it was made joint only. But, as said by DAVIS, J., in *Pickersgill* v. *Lahens*, 15 Wallace, 140: "This presumption is never "indulged in the case of a mere surety, whose duty is "measured alone by the legal force of the bond, *and who* "*is under no moral obligation whatever* to pay the obligee "independent of his covenant, and consequently there is "nothing on which to found an equity for the interposi- "tion of a court of chancery." Holding the same thing, see also

Risley v. *Brown*, 67 New York, 160.
Weaver v. *Shyrock*, 6 Serg. & Rawle (Pa.), 362.
Rawstone v. *Parr*, 3 Russell, 539.
Kennedy v. *Carpenter*, 2 Wharton (Pa.), 344.
Other v. *Iveson*, 3 Drewry, 177.
Town v. *Ammidown*, 20 Pick., 535.
Wood v. *Fish*, 63 New York, 245.

One of the reasons given in some of the cases last cited why the estate of the deceased surety should not be charged, is, that he may have had the obligation made joint only, having in view the fact that he might die, and if he did, his estate would not be liable.

So in the case at bar, the sureties who entered into the recognizance may have been willing to enter into the recognizance for the payment of any judgment that might be recovered, which had the effect of wholly dissolving the attachment and freeing the case thenceforth from any of the ordinary incidents of an attachment, when they would have been unwilling to enter into a bond for the forthcoming of the property, which would have left the attachment proceedings intact. They may, when entering into the recognizance, have contemplated the bankruptcy of plaintiff in error as a contingency likely to happen, and have expected that they would be thereby discharged from liability.

The main question in this case is, does the judgment against Hill with stay of execution bind the sureties in the recognizance to the payment of the amount of that judgment? If it does, then it is in legal effect precisely the same judgment that was entered on the same verdict and was reversed by the court of last resort. The opinion of that court, as before shown, was and is that Hill's discharge in bankruptcy shall free him from this debt.

It will not do to say that the sureties are not parties to this suit, and that their liability can cut no figure in the case. Hill is a party to this suit, and the entire record, showing the liability of the sureties, is before the court. The record shows that if the sureties are obliged to pay this debt, then Hill is bound for it. The main question here presented for decision necessarily turns upon the

question of whether or not this judgment binds the sureties. The question cannot be ignored or evaded in settling Hill's rights as shown by this record. The Supreme court of Illinois, when this case was first before it, did not hesitate to consider the question of the liability of the sureties in this case. On the contrary it fully considered such liability, and made the question of such liability the pivotal point of its decision, holding that unless the general judgment against Hill was affirmed the sureties would be discharged, and affirming the judgment for the avowed purpose of holding them. Why should that court when the case was last before it, refuse to consider the liability of the sureties because the question was not before the court. That it was as much before that court the last time as the first time it considered the case is too clear for argument. Why then refuse to decide it? The reasons written in the opinion have already been referred to.

Another reason which may not have suggested itself to the Supreme court of Illinois, might occur to one familiar with this case. If that court had held that the judgment against Hill, with perpetual stay of execution, did not bind the sureties to pay the debt, then the entry of the judgment was a nugatory act; the evident purpose for which it was entered was defeated; and Hill should have been allowed to plead his discharge in bankruptcy, as is the universal practice, and have no judgment against him by which he and his sureties might be harassed. If on the other hand that court had held that the judgment against Hill with perpetual stay of execution did bind the sureties, and therefore Hill to pay this debt, then the holding would have been in the very teeth of the decision of this court in this case, and it could hardly be

contended that the Supreme Court of Illinois could overrule this court in this regard. It is perfectly clear from this entire record that the Supreme Court of Illinois is not inclined to favor Hill's discharge from this debt, and that to say the least of it, that court will not strain any point to give him the benefit of his discharge as a bankrupt. Entertaining these views and knowing that the matter was reviewable in this court, the liability of the sureties as presented by this record with the light shed on it by the decision of this court was not a pleasant one for the Supreme Court of Illinois to decide. This would not, however, have been so if the decision of this court had been unhesitatingly accepted and bowed to by the Supreme Court of Illinois as the law of this case.

That the Circuit court of Cook county, Illinois, intended to hold and believed it did hold Hill liable for this debt, is manifest from the fact that it required him to give an appeal bond in the sum of $5,000, before it would permit him to appeal from the judgment against him with perpetual stay of execution. (*Record, p. 34.*) No sooner was the case docketed in the Appellate court than defendants in error moved that court to dismiss the appeal, and filed a written argument in support of the motion. (*Record, p. 35.*) This motion the Appellate court took under advisement and did not directly dispose of, but affirmed the judgment of the Circuit court. (*Record, p. 35.*) Hill thereupon prayed for an appeal from that judgment to the Supreme court. Defendants in error strenuously resisted this application, and, although the case was clearly appealable, procured the Appellate court to hold that "no appeal is allowable "in said cause," and an appeal was refused. (*Record, p. 36.*) Plaintiff in error thereupon sued out a writ of error from the Supreme court of Illinois, and removed the case

to that tribunal for decision. Promptly at the first opportunity defendants in error filed their motion in that court to dismiss the writ of error, which motion was taken under advisement. (*Record, p. 37.*) The Supreme court of Illinois in terms overruled this motion (*Record, p. 42*), holding that "whether the (Circuit) court erred in the rendition "of the judgment was a question which plaintiff in error "had the right to present for determination." Certainly it was. How could any lawyer ask an unprejudiced tribunal to hold that the judgment of the Circuit court was final and irreviewable, and thereby cut off a resort to this tribunal to correct the errors of the courts of Illinois in this case? Yet defendants in error did it, and were successful in the effort in the Appellate court.

It is perfectly clear from this entire record that Hill can obtain such rights as the paramount law of the United States guarantees him in this case, only from the direct decision and command of this court, which has held he has such rights. The universal practice in cases such as the one at bar, has been for the bankrupt to plead his discharge, and for a judgment to thereupon be entered in his favor. This is shown by many of the cases already cited and others which might be cited. In such a case, no question could arise concerning the liability of his sureties, and consequently of his liability. He would not be put to the trouble or expense of defending himself in hostile tribunals, with almost the certainty of being deprived of the benefit of his discharge as a bankrupt, and the absolute certainty of a costly litigation to establish his rights if he should finally establish them.

No better illustration of the wrong perpetrated on a bankrupt in such a case can probably be found than the one at bar. The plain effect of the decision of this court

(*Hill* v. *Harding*, 107 U. S., 631,) was that Hill should be freed from his debt. This is the paramount law of the case. Do defendants in error yield to it gracefully, or otherwise? No. On the contrary, no sooner is the judgment reversed by this court than they procure the courts of Illinois to enter a judgment which they claim binds, and those courts no doubt intended should bind the sureties, and consequently Hill, the same as the judgment which was reversed. They thereby contemptuously fling aside the decision of this court—the paramount law. The Supreme court of Illinois, in this case, which is reviewable by this court, refuses on the last hearing, to decide the question of the liability of the sureties, on the ground that the question was not before it, although it had not hesitated to decide the same question on the first hearing. Hill is then obliged to bring his case again to this tribunal.

Instead of having the rights to which he is plainly entitled accorded him in the Circuit court by being allowed to plead his discharge in bankruptcy, he has been obliged to incur the expense of taking this case to the Appellate court of Illinois for the First district, to the Supreme court of Illinois and to the Supreme court of the United States. This is certainly not giving him the repose and freedom from annoyance to which his discharge in bankruptcy entitles him.

Even though this court should hold that the judgment against Hill with perpetual stay of execution did not bind Hill nor his sureties and therefore let the judgment stand; with the same respect for the opinion of this court which defendants in error have already exhibited herein they would no doubt immediately commence proceedings against the sureties in the courts of Illinois, and those

courts would feel at liberty to decide just what they chose with reference to the liability of the sureties, and, therefore, necessarily of Hill. The decision of this court that the sureties were not liable would be regarded as a mere dictum. The Supreme court of Illinois has already in this case by its last opinion decided that point, and it would by that court and all the lower courts of Illinois be held to be the law of the case. The result would no doubt be that Hill would finally be compelled to pay this debt, and the decision of this court be set at defiance.

It seems perfectly clear that the only way the decision of this court can be made effective is that now, all the facts being before it, the judgments of the courts of Illinois be reversed with specific directions to those courts to permit Hill to plead his discharge in bankruptcy and that he be thus released from further annoyance and persecution in this regard. He will then be, except the expenses and annoyance of this litigation, where he should have been five years ago, and where he would have been if the law of this case, as held by this court, had been heeded and given effect. It is respectfully submitted that Hill is entitled in this case to have such a judgment entered as will absolutely and unequivocally free him from this debt in every court whether it be hostile, friendly or indifferent. There should be no question nor chance for litigation about its effect.

The only way in which this can be certainly done is to follow the usual practice and allow Hill to plead his discharge and have judgment in his favor. The practice in Illinois is, and since long before this suit was brought has been very liberal with reference to allowing any paper to be filed at any time before final judgment, which would enable the "defendant to make a legal defense." The fol-

lowing statute has during all that time been, and now is in force. (Statutes of Illinois, chapter 110, entitled "Practice," § 24) viz: "§ 23. At any time before final "judgment in a civil suit amendments may be allowed on "such terms as are just and reasonable, introducing any "party necessary to be joined as plaintiff or defendant, "discontinuing as to any joint plaintiff or joint defendant "changing the form of action, and in any matter either of "form or substance in any process, pleading or proceed-"ing which may enable the plaintiff to sustain the action "for the claim for which it was intended to be brought, "or the defendant to make a legal defense. The adjudi-"cation of the court allowing the amendment shall be "conclusive evidence of the identity of the action."

This statute is extremely broad and has been liberally construed by the courts of Illinois. It is held by them that under the foregoing statute leave to amend, alter or add to pleadings so as to present an issue on the merits of a cause at any time before final judgment, is no longer discretionary with the court but is a legal right of the party, *Empire Fire Ins. Co.* v. *Real Estate Trust Co.*, 1 Bradwell, 391; *Drake* v. *Drake*, 83 Ill., 526. The judgment having been reversed and the case re-docketed in the Circuit court, the case was open for further proceedings. Hill thereupon presented and asked leave to file a plea of his discharge in bankruptcy. The plea presented a complete defense to the action and it was not matter of favor but matter of right that he should have been permitted to file it. He was, however, denied that right for the sole purpose of evading the decision of this court in this case.

The practice pursued in similar cases (and which were approved by this court in deciding this case) was for the

debtor to file a plea of his discharge in bankruptcy and be thereupon discharged. This is undoubtedly the proper practice, and as it is the one approved by this, the court of last resort in this case, it should have been pursued. It is respectfully submitted that to pursue any other course was to commit a gross and palpable error, and however veiled and disguised the means may have been to set at defiance the decision and authority of this court.

It is very confidently submitted that the refusal of the courts of Illinois to allow Hill to plead his discharge in bankruptcy as a defense to this case, and to be thereupon discharged, was a thinly disguised attempt to hold him liable for a debt from which this court had decided he should be freed; was a proceeding in hostility to the decision of this court instead of in conformity thereto; and was, to say the least, a very gross error, for which this judgment should be reversed.

II.

THE COURT ERRED IN TRYING THE CASE OUT OF ITS REGULAR ORDER.

Section *seventeen* of the Practice Act (Statutes of Illinois, Chapter 110) requires that all causes shall be "tried "or otherwise disposed of" in the order they are placed on the docket of the court by the clerk. Plaintiff in error requested that this be done in the case at bar (*Record, p. 29*), but the court reinstated the case, tried the question of fact, and disposed of it all in one day and within a few minutes. This was advancing a cause with a vengeance, and was, it is submitted, highly erroneous.

Fisher v. *Nat. Bank of Commerce*, 73 Ill., 34.

Angel v. *Plume & Atwood Manuf. Co.*, 73 Ill., 412.
Griswold v. *Shaw*, 79 Ill., 449.
Sea v. *Glover*, 1 Bradw., 335.
Brown v. *Davis*, 3 Bradw., 639.
Kilian v. *Clark*, 9 Bradw., 426.

III.

THE COURT ERRED IN DENYING HILL A TRIAL BY JURY.

Right of trial by jury is guaranteed to every party to a suit at law, both by the constitution of the State of Illinois and of the United States. After this case was redocketed in the Circuit court, there was a question of fact to be tried, viz: whether or not plaintiff in error had been discharged in bankruptcy. He demanded a jury to try this question of fact. (*Record, p. 29.*) The court, however, refused his request, and against his protest proceeded to try this question of fact without a jury. It is submitted that this was error for which the judgment should be reversed.

IV.

THE COURT ERRED IN ADMITTING AS EVIDENCE THE APPER PURPORTING TO BE A COPY OF THE DISCHARGE OF HILL IN BANKRUPTCY.

The alleged copy was in no way authenticated, except by a certificate signed "WM. H. BRADLEY, *clerk*," and an impression purporting to be the seal of the District court of the United States, for the Northern District of Illinois. Neither the signature of the alleged clerk, nor

the fact that he was clerk, nor the authenticity of the seal of the court were proved by any witness, nor in any way except by the production of the paper itself.

The courts of the United States are foreign courts to those of Illinois, and their judgments are foreign judgments. In *Baldwin* v. *Hale*, 17 Johnson, 272, the Supreme court of New York held that "the Circuit court of the "United States, in relation to this (that) court is neither a "superior nor an inferior court; but is to be regarded as a "court of another government. Their records, therefore, "as to this purpose, are foreign records, *and the verity of "them must be tried by jury.*" This case was reaffirmed and approved in *Griswold* v. *Sedgwick*, 1 Wendell, 126. A multiplication of authorities on this point is thought to be unnecessary. It is a notorious fact that the courts of the United States sitting in Chicago consider themselves in no way bound by the decisions of the Supreme court of Illinois except where such decisions constitute a rule of property. In all other cases a decision of the Supreme court of Michigan is by the United States Courts there considered quite as much authority as a decision by the Supreme court of Illinois. It is also well known that as to some important questions the Supreme court of the United States and the Supreme court of Illinois hold the direct opposite of each other.

The Courts of the United States and the State of Illinois are foreign to each other, and the rules with reference to the authentication of foreign judgments prevail when the record of one is offered in evidence in a proceeding in the other. These rules are well known, thoroughly settled, and are thus summarized in § 514 of 1 Greenleaf on Evidence, viz:

"The usual modes of authenticating foreign judgments,

"are either by an exemplification of a copy under the great "seal of a state, or by a copy, proved to be a true copy "*by a witness* who has compared it with the original; "or by the certificate of an officer, properly authorized "by law to give a copy; *which certificate must itself also* "*be duly authenticated.* If the copy is certified under the "hand of the judge of the court, *his handwriting must be* "*proved.* If the court has a seal, it ought to be affixed "to the copy, *and proved*; even though it be worn so "smooth, as to make no distinct impression. And if it is "clearly proved that the court has no seal, it must be "shown to possess some other requisite to entitle it to "credit. *If a copy is merely certified by an officer of the* "*court, without other proof, it is inadmissible.*"

In the case at bar, the only proof of the alleged copy was a certificate by an alleged officer of the court, without any evidence that he was such officer.

In *Brackett* v. *The People*, 64 Ill., 170, the judgment of a court of Missouri certified by the clerk with the seal of the court attached, was held inadmissible as evidence. Among other things the court said: "the copy of record "received in evidence was simply certified by the clerk "with the seal of the court attached. There was no cer- "tificate of the presiding judge as required by the act of "Congress. * We are of opinion that the court erred in "admitting the copy of the records," etc.

It is submitted that this decision is exactly in point, and conclusive of the question here discussed.

Section *thirteen* of the chapter on Evidence and Depositions (Statutes of Illinois, Chapter 51) refers only to the records of courts of that state, and not to the records of courts of a foreign jurisdiction.

Section 4,992 of the Revised Statutes of the United States, which makes the proceedings in bankruptcy matters of record, and makes copies thereof "duly certified" evidence, does not help appellees in this regard. The alleged copy in this case was not "duly certified," as has been before shown. This section was not intended to, and does not change the rules of evidence with reference to the authentication of the records of a foreign court.

Defendants in error in the various courts of Illinois reiterated and elaborated over and over the idea that if the Circuit judge, by somebody telling him so on the street, seeing a report to that effect in a newspaper, or in any way, with or without evidence, became satisfied that Hill had been discharged in bankruptcy, that was all that was required under the order of the Supreme court of Illinois. Furthermore, they contended that such satisfaction of the Circuit judge was a final determination of the matter which was not subject to review anywhere. This proposition is so utterly absurd that to refute it is simply to state it, although the Appellate court for the First District of Illinois held it to be law.

The mandate of the court was "that upon it satisfactorily "appearing," etc. (*Record, p. 26.*) It does not say "that "upon one of the circuit judges becoming satisfied," etc., although the law would in that case have been the same. How is a fact of which the court does not take judicial notice made to "satisfactorily appear" in a suit at law? The prevailing impression is that it is by legal evidence offered and received, and which tends to show the fact. Whether such evidence is legal evidence is matter of law reviewable in the appellate tribunals. Whether it is sufficient to satisfactorily establish the fact required to be established is also a matter reviewable by the appellate tri-

bunals. Argument cannot make a self evident proposition any clearer, and further comment on this matter is therefore forborne.

Defendants in error also contended in the various courts of Illinois that the plea which Hill offered, but was refused leave to file, proved that he had been discharged in bankruptcy. This is another instance of blowing hot and blowing cold by defendants in error. They say the plea is not in the case, so as to found any right for Hill on it, but is in the case as evidence for them. As this plea was, on the objection of defendants in error, entirely excluded from the case, it is difficult to perceive how it could prove anything. Defendants in error are evidently under the impression that no evidence at all concerning this matter was necessary, but that the Circuit Judge might out of his own inner consciousness evolve everything necessary to make it " satisfactorily appear " to himself, that appellant had been discharged in bankruptcy. If the Circuit Judge really could comply with the law in that way, then perhaps the matter of his satisfaction could not be appealed from, nor could a writ of error be prosecuted to review it. Its renewal under such circumstances would at all events be a matter of much difficulty.

Defendants in error also argued in the various courts of Illinois that it devolved upon Hill to prove that he had been discharged as a bankrupt, even to obtain the boon of a judgment against him with stay of execution. Without further commenting on this proposition, it is sufficient to say that Hill did not prove, nor offer to prove, that fact, and if proof by him is necessary to sustain this judgment, it must fall.

Defendants in error also argued in the various courts of Illinois that from the length of time elapsing between

April, 1878, when Hill filed his petition in bankruptcy, and the fall of 1883, the Circuit Judge could presume that he had been discharged in bankruptcy. The Supreme court of Illinois could just as well have indulged that presumption from the same facts, and in their order have said: "It "appearing from the lapse of time that appellant has "been discharged in bankruptcy," etc. The Supreme Court, however, did not feel itself authorized to indulge that presumption, but remanded the case for proof on the subject.

It is respectfully submitted that all these speculations and suggestions advanced by defendants in error, are without force, and not worthy a moment's consideration. The record in this case puts an absolute quietus on them all, if quietus was necessary. It states affirmatively that the alleged copy of Hill's discharge in bankruptcy, "so "received by the court, was the *only evidence* offered or "received showing or tending to show that appellant "(Hill) had been discharged in bankruptcy." (*Record, p. 30.*) If that was competent and sufficient, then the fact was proved, and "satisfactorily appeared," otherwise not.

V.

THE COURT ERRED IN REFUSING TO ENTER JUDGMENT FOR HILL.

If Hill had been discharged as a bankrupt, then, as the cause of action in this case existed when he filed his petition, and was provable against his estate, it should have been barred by his discharge. A judgment discharging Hill from all liability, on account of the matters involved in this case, subsequent to the time of filing his petition,

at least, should have been entered if he was denied leave to file a plea of his bankruptcy.

VI.

THE COURT ERRED IN ENTERING JUDGMENT AGAINST HILL.

The verdict of the jury rendered in this case, on April 12, 1878, was merged in the judgment entered thereon, May 11, 1878, and then ceased to have an existence. The reversal of a judgment destroys the judgment itself, and the verdict on which it rests. The order reversing and remanding invariably says, that the *judgment* is reversed, and says nothing about the verdict. In such a case no order is ever made, either in the Circuit Court or the court above, setting aside the verdict. The order in the upper court is, simply, that the judgment be reversed; in the lower court, that the cause be redocketed. If the case is tried again and another verdict rendered, no one was probably ever heard to say that there were two verdicts in existence in the case. If, in such a case, there is only one verdict in existence, and that the last, then in this case there was no verdict in existence on November 24, 1883, when the judgment here complained of was rendered.

Boynton v. *Ball*, 106 Ill., 627.

There was no evidence whatever, either introduced or offered after the first trial of the case, tending to show that Hill was indebted to defendants in error in any sum whatever. As there was no verdict nor evidence to support the judgment, it must necessarily fall.

In the order containing the judgment here complained

of there is no statement why nor on what said judgment was rendered, nor no reference nor allusion to the verdict theretofore rendered in the cause, nor to any verdict nor any evidence of indebtedness. (*Record p. 24*) There is no order overruling a motion for new trial. There is a statement that it was made to appear that Hill had been discharged in bankruptcy, and "*therefore*" judgment is rendered against him. This is a reason why judgment should be rendered for him, but is of itself alone hardly a sufficient ground on which judgment could be rendered against him.

For these various and manifold errors, but especially because Hill was not permitted to plead his bankruptcy and be discharged from the debt in this case as this court held he was entitled to be, a reversal of the judgments of the courts of Illinois is here asked, with such specific directions as to the disposition of the case as will free Hill from further persecution in this regard.

Respectfully submitted.

GEORGE W. BRANDT,

Attorney for Plaintiff in Error.

Supreme Court of the United States,

OCTOBER TERM, A. D. 1888.

NO. 253.

GEORGE W. HILL,
Plaintiff in Error,
vs.
GEORGE F. HARDING, WILLIAM H. BARNUM AND LAWRENCE J. J. NISSEN,
Defendants in Error.

Error to Supreme Court of Illinois.

Brief and Argument for Defendants in Error.

POINTS.

I.

No federal question is now involved, and the writ of error should be dismissed.

Some judgment had to be entered. What it should be, was a state question, not a federal one; and was left to the state courts.

Hill v. *Harding*, 107 U. S., 631.

II.

This court held explicitly that "if the discharge is "granted, *the court in which the suit is pending may then* "*determine* whether the plaintiff is entitled to a special

" judgment *for the purpose of charging sureties* upon a " bond given to dissolve such an attachment," and also held that " the authority of the court in which the suit is " pending, now that the defendant has obtained his dis- " charge in bankruptcy, to render a special judgment in " favor of the plaintiffs *for the purpose of charging the* " *sureties*," was a question which depended perhaps " upon " the *statute or the practice of the state*."

Hill v. *Harding*, 107 U. S., 634.

III.

The stay was not a bar to the action. It operated as a mere suspension of proceedings until the discharge, but no longer. After the discharge, the state court had as much power to proceed to judgment as it had before there was a stay, or as if no stay had been applied for. " The court may, of course, proceed to judgment."

Hill v. *Harding*, 107 U. S., 634.
In re Rosenberg, 2 Bank. Reg., 236;
S. C., 3 Benedict, 14.
Doe v. *Childress*, 21 Wall., 642.
Eyster v. *Gaff*, 91 U. S., 521.
Norton v. *Switzer*, 93 U. S., 355.
Davis v. *Friedlander*, 104 U. S., 570.

The provision of the Bankrupt law (Rev. Stat. U. S., § 5,106) that " No creditor whose debt is provable shall " be allowed to prosecute to final judgment any suit at " law or equity therefor, against the bankrupt *until* the " question of the debtor's discharge shall have been de- " termined," allows by clear implication procedure to final judgment against the bankrupt *after* his discharge. And

even in the meantime, debts not provable may be prosecuted to final judgment against the bankrupt; and so may debts provable if there has been unreasonable delay in obtaining the discharge; or, "if the amount due the "creditor is in dispute, the suit, by leave of the court "in bankruptcy, *may proceed to judgment* for the purpose "of ascertaining the amount due, which may be proved "in bankruptcy, but execution shall be stayed." (Rev. Stat. U. S., § 5,106.)

IV.

The judgment entered, with perpetual stay of execution, was "a special judgment," directed and afterwards affirmed as such, by the Supreme court of Illinois, pursuant to the settled practice in that and other states, as well as in the federal courts.

Hill v. *Harding*, 116 Ill., 98.
Byers v. *Natl. Bank*, 85 Ill., 426.
Baker v. *Taylor*, 1 Cow., 165.
Holyoke v. *Adams*, 59 N. Y., 234.
Monroe v. *Upton*, 50 N. Y., 593.
Palmer v. *Hutchins*, 1 Cow., 42.
Hoyt v. *Freel*, 8 Abbott's Prac. Rep. (N. S.), 220.
Cornell v. *Dakin*, 38 N. Y., 253.

And see decree for recovery against Marks, Pumps & Co., staying execution, in *Wolf* v. *Stix*, 99 U. S., 1.

V.

The Bankrupt law, by dissolving attachments levied within four months (Rev. Stat. U. S., § 5,044), and not interfering in any way with rights, liens and securities ac-

quired by attachment prior to four months preceding the bankruptcy, manifestly intended that creditors should have the benefit of such prior attachments. This they cannot have, unless they can have the benefit, not only of the lien, but of any recognizance given in lieu of it. The only benefit of the attachment is then the benefit of the recognizance, which the creditor should have, because the recognizance is just as much an attachment security as the lien was.

The only means of making either the lien or the recognizance effectual is the rendition of a judgment; and the same considerations of reason and justice which require it in the one case require it in the other. See references cited under points IV. and III., *supra;* also

Holyoke v. *Adams*, 1 Hun., 224.
In re Albrecht, 17 National Bank. Reg., 287.
Peck v. *Jenness*, 7 How., 612.
Davenport v. *Tilton*, 10 Met., 328.

In each case the judgment is necessarily special, and, although not in substance, yet is "in form a judgment "*in personam*," according to Chief Justice Shaw, in *Davenport* v. *Tilton*, 10 Met., 328. The form is, "that the "plaintiff recover against defendant so much money," to be levied only of the goods, chattels and estate of the defendant attached, "and not otherwise," in one case (as in *Peck* v. *Jenness*, 7 How., 612), or not to be levied at all, but execution perpetually stayed, in the other (as in *Hill* v. *Harding*, 116 Ill., 98; *Wolf* v. *Stix*, 99 U. S., 1, and various cases above cited under point IV.)

"A legal right without a remedy would be an anomaly "in the law."

Peck v. *Jenness, supra.*

"Every person ought to find a certain remedy in the "laws for all injuries and wrongs which he may receive "in his person, property or reputation."

Constitution of Illinois, Bill of Rights, Art. II, Sec. 19.

"Where a statute confers a right, it confers all the "necessary means by which such right can be established "and made effectual."

Davenport v. *Tilton, supra.*

VI.

The pleadings were closed and verdict found upon the issues April 12, 1878. The plea of discharge in bankruptcy was tendered on November 24, 1883, more than five years after verdict. The rejection of the plea at that stage, with judgment on the verdict and perpetual stay of execution, was a matter of purely state practice, under a statute of Illinois, providing "that the common law of En-"gland, so far as the same is applicable and of a general "nature * * * shall be the rule of decision and shall "be considered as of full force until repealed by legisla-"tive authority."

Rev. Stat., Chapter 28.

Wherever that practice prevails, "the court will order "a perpetual stay" "where the defendant is discharged "intermediate the verdict and judgment," the reason being "because the discharge was too late to admit of its "being pleaded *puis darrein continuance.*"

Baker v. *Taylor*, 1 Cowen, 165.

Palmer v. *Hutchins*, 1 Cowen, 42.

1 Chit. Plead., 637.
Bull. N. P., 310.
Holyoke v. *Adams*, 59 N. Y., 234.
7 Bac. Abridg., 685-6-8.
Brown v. *Beardsly*, 3 Caines, 172.
Corncll v. *Dakin*, 38 N. Y., 553.

The decision of the State Supreme court in this case, 116 Ill., 99, against allowing such a plea five years after verdict settles adversely to counsel his contention that such a plea was allowable by chapter 110, § 23 of the Practice Act, relating to "Amendments." This is not a federal but a state question.

Besides, the plea offered was not an "amendment" of anything, and so did not fall within the act.

The court's discretion in ruling upon amendments at the trial is not assignable for error in the Supreme court of the state.

Knickerbocker Ins. Co. v. *McGinnis*, 87 Ill., 70. Much more discretionary and much less assignable for error is the ruling of the court refusing a plea, not amounting to an amendment, five years after issues upon the pleadings were settled by verdict.

Amendments under our statutes are conditioned upon their "not being against the right and justice of the matter."

Doty v. *Colton*, 90 Ill., 454.
Rev. Stat. Ill., Chap. 7, § 7.

VII.

The Circuit court rightly refused the plea of discharge, even supposing it to have been, contrary to the fact, either an amendment or a *plea puis darrein*, because in

either case the court was justified by the settled practice in disallowing such a plea, at such a time, if the consequence of allowing it would be to work injustice to the plaintiffs by preventing a judgment, and thereby destroying the record security of the recognizance.

The courts have always exercised the right to strike from the files, and to refuse *pleas puis darrein*, which, if they prevailed, would be unjust and injurious to the plaintiff.

See cases reviewed by Mr. Justice Folger in

Holyoke v. *Adams*, 59 N. Y., pages 236, 7, 8, 9 and 240, and cases under point VI.

VIII.

Plaintiff in error was not deprived by the court of the benefit of his discharge. The only benefit it entitled him to was the release from existing and provable debts; Rev. Stat. U. S., § 5,119, and that was secured to him by the perpetual stay of execution.

The court was not required, if indeed it was permitted by the bankrupt act to give to the discharge the effect of releasing what was neither an existing nor certain to become a future debt to the sureties on the recognizance, but only "a contingency or possibility that such claim or "debt might exist at some future time," (*Ellis* v. *Ham*, 28 Me., 385), or "a contingency whether there will *ever* "be a demand." (*Woodward* v. *Herbert*, 24 Me., 358.) "Such a claim could not be proved *or discharged* under "the act of Congress."

Ellis v. *Ham*, *supra*.

Every case quoted by counsel for plaintiff in error to

the same effect (Brief, 19 to 25) is a justification of the Illinois courts in their refusal in this case to give the discharge a wider scope than the bankrupt law gives it (§ 5,119) in order to deprive creditors of an attachment security earned through a lien, the benefit of which was within the clear protection of that law.

The debt of a bankrupt which exists at the time of his bankruptcy, and the debt which he may owe (or may never owe), at a future time to the sureties on his recognizance are certainly *different* debts. There is no reason in the nature or necessity of things, why because the former debt is to be discharged, the latter shall be also, when the bankrupt act instead of requiring, forbids it.

IX.

The next proposition bearing upon the merits of this controversy may be put in the words of Mr. Chief Justice Gray in *Barnstable Savings Bank* v. *Higgins*, 124 Mass., 115:

"The fact that the sureties may hereafter have a right, "upon paying the amount of the judgment, to recover "over against the principal, affords no reason why the stat- "ute should not authorize, *or* the court should not order a "special judgment to charge the sureties according to the "terms of the bond which both principal and sureties "have voluntarily given."

This passage and the passages quoted under point II from the opinion of the same learned Justice, in 107 U. S., 634, prove that the courts whose respective opinions he was delivering saw nothing inconsistent with the bankrupt act in a statute *or* court practice warranting a judgment for the purpose of charging the sureties.

It evidently was not the meaning of Mr. Justice Gray that we must enact an Illinois statute prescribing a general judgment with stay of execution or some other form of judgment for the purpose of holding the sureties.

It might depend on a statute *or* on the practice. Either way was lawful in the opinion of this court, and neither would be in conflict with the federal law.

It would be absurd to say that Illinois could thwart the true intent of the bankrupt law by passing a statute but not by court practice. These opinions put a state law and court practice on the same footing, because the purpose to be accomplished was not forbidden, but encouraged, by the federal bankrupt law and the federal court construing it.

The "practice" in Massachusetts, as settled by a series of decisions there, was against the rendition of any judgment to charge the sureties; and solely because the "practice" was inadequate to meet the ends of justice, a statute had to be, and was, enacted authorizing a judgment for that object. Subsequent decisions very properly held that the relief afforded by the statute from the hardships imposed by prior practice was confined to the cases provided for by the statute.

Barnstable Savings Bank v. *Higgins*, 124 Mass., 115.

Denny v. *Merrifield*, 128 Mass., 228.

The "practice" never having been in Illinois what it was in Massachusetts, but the contrary, as it was and is in numerous other states, as well as in federal courts and at common law (Point IV), no special statute was needed, and none exists, narrowing the courts down to a stated and scanty measure of relief.

This court's opinion in *Hill* v. *Harding*, 107 U. S., 631, instead of ruling, as claimed, that the Massachusetts practice should govern Illinois, ruled just the reverse, that the Illinois courts should be guided by their own practice.

They could have been told in very few words not to enter a judgment against Hill, or that they could not enter any, had this court agreed with counsel's former argument. They were not so told, but were told, on the contrary, that they might decide for themselves, as a matter of state practice, to enter a judgment for the purpose of charging the sureties, if they saw fit.

The cases of *Page* v. *Cole*, 123 Mass., 93, *McKay* v. *Funk*, 37 Iowa, 661, and *Bratton* v. *Anderson*, 5 S. C. R., 504, were cited by Mr. Justice GRAY, in *Hill* v. *Harding*, 107 U. S., 634, upon the sole point decided by them, which was that, upon the suggestion of bankruptcy pending a suit, proceedings ought to be suspended and no judgment entered until the determination of the question of a discharge. They were not cited as deciding and do not decide that, after the discharge, a special judgment, perpetually staying execution, may not be entered.

The *nunc pro tunc* judgment in *Page* v. *Cole*, dated back of the suggestion of bankruptcy for the purpose of evading it, and providing for neither a perpetual nor a temporary stay of execution, was of course erroneous. There is not a feature of resemblance between that case and this.

The cases of *Martin* v. *Kilbourn*, 12 Heiskell (Tenn.), 331, and *Odell* v. *Wootten*, 38 Georgia, 224, cited by counsel, were actions against sureties on appeal bonds conditioned to pay judgments, and simply decide that, *no judgments having been obtained*, the sureties were not liable on their bonds, a self-evident proposition.

As said in *Wolf* v. *Stix*, 99 U. S., 1, "the obvious reason "is that the event has not happened on which the liability "of the surety was made to depend." The citation of this case was unnecessary to prove that sureties on the recognizance in this suit cannot be held in the absence of a judgment against the principal.

Payne v. *Able*, 7 Bush., 344, was also a case in which the sureties were held not liable because there was *no judgment*. The attachment in that case was levied (in July, 1868), *less than four months before the petition* in bankruptcy was filed (which was on October 22, 1868. See report of case.) By such an attachment no rights or securities were acquired which were entitled under the bankrupt law to be made available by means of a judgment.

Carpenter v. *Turrell*, 100 Mass., 450, led to such unjust consequences that the legislature of Massachusetts had to interfere to prevent them. While holding that a bond given to dissolve an attachment "is in many respects "a higher and better *security* for the creditor *than the* "*attachment*," because, as stated in the next sentence, "it is not liable to be discharged by the insolvency or "death of the debtor," the decision, nevertheless, goes on to make the insolvency of the debtor discharge and destroy this higher and better security, provided by the attachment law.

The courts of other states after due consideration of *Carpenter* v. *Turrell* have distinctly declined to follow it, *Holyoke* v. *Adam*, 1 Hun., 225–6, S. C. 59 N. Y., 234. *Hill* v. *Harding*, 116 Ill., 98. *Byers* v. *Natl. Bank*, 85 Ill., 426. *In re Albrecht*, 17 Natl. Bank. Reg., 287. *In re Davis*, 4 Bank. Reg., 720; and this court, in *Hill* v. *Harding*, 107 U. S., 631, has substantially declared

against it, by holding that a special judgment might be entered for the purpose of charging the sureties, if Illinois practice permitted it.

Besides, the defense of the *discharge* in bankruptcy in *Carpenter* v. *Turrell* came before the court *at the trial*, upon a *stipulation* (see 100 Mass., page 450) "that the defendants' plea of the pendency of proceedings in bankruptcy might be taken *as a plea of discharge* in bankruptcy, and should have the same operation and effect as the defendants' discharge would have, *if they had obtained and pleaded the same.*"

In the case at bar, no such stipulation prevented the court from rejecting the plea of discharge, years after verdict, consistently with the decisions cited under Points VI and VII; and in doing so, but at the same time giving the defendant the benefit of his discharge by a judgment perpetually staying execution, the court did what was done in all those cases, and could be done as said by Mr. Justice FOLGER in *Holyoke* v. *Adams*, 59 N. Y. 239, "without any consideration of the question, "on which the "courts below (1 Hun., 225) and the court in Massachusetts in *Carpenter* v. *Turrell* are at variance."

X.

The last three points urged for plaintiff in error are questions of purely state cognizance and practice.

They are, that the court erred, first, in trying the case out of its regular order; secondly, in admitting in evidence the certificate of Hill's discharge; and, thirdly, because there was no verdict on which to enter the judgment.

These questions were settled by the Supreme court of Illinois adversely to plaintiff in error in *Hill* v. *Harding*, 116 Ill., 99, and are not here open to controversy. Nevertheless, in vindication of the state courts' motives, as well as their action, both of which are assailed by counsel, the argument laid before those courts on the points last mentioned will be reprinted at the close of this brief.

ARGUMENT.

The first four points above made are submitted without further argument.

In support of points five to nine, inclusive, by way of illustration of them, and for the convenience of this court, the following quotations are made:

Mr. Justice FOLGER, delivering the opinion of the court in *Holyoke* v. *Adams*, 59 N. Y., 234, said:

"The courts below put the denial of the order (for "leave to file a supplemental plea setting up discharges "in bankruptcy) on the ground that the plaintiffs had ob- "tained a lien by attachment upon property of the defend- "ants, over four months before the granting of either "discharge; that thus a lien had been obtained which "would be unaffected by the bankrupt law; that the de- "fendants, having given an undertaking with sureties, "that property was released from attachment; that if "now this defense is permitted no judgment is likely to "go against the defendants, and the sureties in the under- "taking will be relieved from the letter of their obliga- "tion, for that by its terms is not broken until a judgment "is recovered by the plaintiffs, but that *the undertaking* "*of the sureties* is to be held *in legal contemplation*, to be "*a part of and in continuation* of the attachment pro- "ceedings, and a *substitute* for the levy made thereunder. "* * * It is quite certain that the effect of "this defense, if interposed, will be to deprive the plaint- "iffs of a fair and honest advantage they had obtained

"by their diligent pursuit of legal means and remedies. "*And there is presented to the courts a strong case of an* "*injustice to be wrought by the forms of law if this plea is* "*received.*

"It is said that it is the rightfully overbearing effect of "the federal law upon the state law and practice, and that "the discharge from the debts having been given to these "defendants in pursuance of paramount law, the courts of "this state must give full effect to it.

"But is that just the position in which the courts of this "state are placed?

"First, the *courts are not denying to the discharge its* "*appropriate effect*, after it is in due form and regularity "brought to their judicial knowledge. * * * The "discharge must be brought before the court to be avail- "able for a final judgment thereon against the plaintiffs, "upon a formal averment thereof by answer, with a day "to the plaintiffs in court to contest its validity, and to put "the defendants to their proof. As yet it is a thing as- "serted, not proven. And the application to the court "is for leave to plead and prove it after the defendants "*have raised other issues*, have, to some extent, *tried them*, "and have taken other proceedings in the action hostile "to the plaintiffs. May not the courts say that here is a "case for the exercise of the discretion reposed in us to "decide whether the leave to put in this new defense "would not work injustice to a party to a suit?

"May they not say, we decline to permit a new issue "upon the record in this action, which, if it should be "tried, might defeat the plaintiffs and deprive them of a "proper advantage which they have lawfully obtained? "* * * Again, a discharge is not a bar to any action "in any stage without being pleaded. (*Cornell* v. *Dakin*,

" 38 N. Y., 253); (and see to the same effect *Horner* v. " *Spelman*, 78 Ill., 257.) And if the defendant is too late " to plead, either originally or by amendment, the remedy, " it seems, is by motion for a perpetual stay of execution. " *Monroe* v. *Upton*, 50 N. Y., 593.) So that the defend- " ants are not without reasonable opportunity to present " their discharge to the courts of this state and obtain for " it the effect to which it is entitled. Moreover, though " the discharge should be effectual to bar an ordinary " claim, or even the claim of the plaintiffs in the position " in which it was when the defendants obtained their dis- " charge, still it is against the spirit of the bankrupt act " that this debt should be thus affected. The plaintiffs " were lien creditors at one time, and would have so con- " tinued but for the defendants availing themselves of a " privilege given by the statute of this state, which the " bankrupt act did not afford to them. The plaintiffs ac- " quired their lien more than four months before the com- " mencement of the defendants' proceedings in bank- " ruptcy. Such a lien the bankrupt act exempts from the " operation of the assignment of the bankrupt's effects, " and had the attachments remained undischarged the " plaintiffs would have held their debt secure.

" * * * On the whole it seems that the spirit of our " own statute, and the spirit of the bankrupt act will be " satisfied, and that injustice will be avoided if this case " shall be put in the class of those in which it is *discretion-* " *ary with the courts to refuse leave to put in a supple-* " *mental answer.*

" It follows that the *appeal* from the order should be " *dismissed* with costs."

Mr. Justice BRADY, delivering the opinion of the Supreme court of New York in the same case, 1 Hun, 224,

said, referring to the bond given to dissolve the attachment:

"The character of the undertaking, its subject, office "and purpose, leave no doubt that it is a substitute for the "levy under the attachment, which, *in effect*, continued, "although *the process* is discharged."

In *Peck* v. *Jenness*, 7 Howard, 623, Mr. Justice GRIER, delivering the opinion of the Supreme Court of the United States in favor of a judgment rendered in an attachment case, said:

"In order to give full effect to all the provisions of the "act, the bankrupt's certificate must be made to operate "as a discharge of his person and future acquisitions, "while, at the same time, the mortgagees or other lien "creditors shall be permitted to have their satisfaction out "of the property mortgaged or subject to lien. A legal "right without a remedy would be an anomaly in the "law.

"The judgment rendered in this case has fully attained "both these objects. While it discharges the defendant "from personal liability, it saves to the plaintiffs below "their remedy, and awards their satisfaction out of the "property attached, 'and not otherwise.' The books are "full of precedents for such a judgment.

"When an administrator pleads *plene administravit*, "the plaintiff may admit the plea and take judgment of "assets, *quando acciderint*. When the defendant pleads "a discharge of his person under an insolvent law, the "plaintiff may confess the plea, and have judgment to be "levied only of defendant's future effects. (1 Chitty Pl., "548.)"

In *Davenport* v. *Tilton*, 10 Met., 330, Chief Justice

SHAW said that if an attachment is a lien or security to be made available only by a judgment and execution of some kind, then there would be in legal effect, though unexpressed, a proviso as follows:

"Provided, that nothing in this act contained shall be "construed to prevent an attaching creditor from obtain- "ing such judgment or execution as may be necessary to "give legal effect to his attachment."

He also said:

"Such special judgment or special award of execution, "although not frequent, is not unprecedented. The law "having exempted the person of a debtor from arrest, "after having taken the poor debtors' oath, leaving his "property liable, the process may be varied accordingly.

"And generally, where a party has a right which can- "not be obtained by the ordinary forms of process, the "court will vary these forms, so as to secure the party his "right. (*Cooke* v. *Gibbs*, 3 Mass., 193.)" * * * "And it is believed, that such special judgment and award "of execution are not unknown to the common law of "England, when the rights of the parties require it," citing *Tappan* v. *Poor*, 15 Mass., 419; 3 Wentworth's Pleadings, 121; *Smith* v. *Buchanan*, 1 East, 6, and *Ingraham* v. *Phillips*, 1 Day, 117.

Upon the questions grouped under Point X, *ante*, the same argument is reprinted and now submitted, which was addressed to the Supreme court of Illinois. It is as follows:

"The mandate of this court of September 28, 1883, "and the consequent mandate of the Appellate court, "*ordered* that the previous judgment of the Circuit court "be reversed, and the said cause remanded to said Circuit

" court with directions to that court that upon its satisfacto-
" rily appearing that the appellant has since the rendition
" of the verdict in said cause received his discharge in
" bankruptcy it enter a judgment in favor of the plaintiffs
" and against the said defendant, *upon the verdict* hereto-
" fore entered in this cause with a perpetual stay of exe-
" cution. (Rec., 58.)

" Precisely such a judgment with a perpetual stay of
" execution was accordingly entered in obedience to those
" mandates. (Rec., 54.) The judgment record recites
" (page 55) that it had been made satisfactorily to appear
" to the court that since the rendition of the verdict the de-
" fendant Hill had received his discharge in bankruptcy,
" and states the facts from which it was so made to appear."

* * * * *

" The scope of the examination, then, is to inquire
" whether the Circuit court *executed* the mandate by first
" satisfying itself as to the fact and date of the discharge,
" and, *secondly*, by entering judgment and staying execu-
" tion perpetually.

" The only inquiry is whether enough appeared to sat-
" isfy the Circuit court. Enough did so appear, and the
" Circuit court says so in its judgment entry. (Rec.,
" 54.)

" If, however, this court considers itself called upon, in
" the examination of the subsequent proceedings, * * *
" to enquire whether enough was enough, or whether the
" Circuit court ought to have required more than enough
" to satisfy it, then, we submit, that what did appear was
" enough, and more than enough, to satisfy any and every
" reasonable court that Hill had received his discharge.

" The record here shows that it was a fact admitted
" and relied on by both sides. The same was true in the

" Supreme court of the United States. Hence, the opin-
" ion of Mr. Justice GRAY, at the close, contains the fol-
" lowing language: 'Now that the defendant has ob-
" tained his discharge,' also the direction of further pro-
" ceedings, 'upon the production by the defendant of his
" certificate of discharge.'"

107 U. S., 634.

" No *plea* was suggested—only the *production* of the
" discharge. It clearly appeared to the Circuit court that
" the stay sought on the suggestion of bankruptcy was,
" to quote the very language of the motion therefor, a stay
" 'to await the determination of said court of bankruptcy,
" on the question of the discharge' (Rec., 50), 'provided'
" —and all this is couched in the very language of the bank-
" rupt law (Sec. 570)—'there be no unreasonable delay
" in endeavoring to obtain his discharge.'

" The Circuit court saw by its own record and files
" that unless the discharge had been obtained, the delay
" of nearly six years in obtaining it had been unreason-
" ably long, and for that reason alone it had a right to
" proceed. It also saw in the mandates the decision of
" the Supreme court, that the time for presenting a dis-
" charge and proceeding with the case had arrived, and
" that the plaintiffs, no less than the defendant, were at
" liberty to make the fact of the discharge satisfactorily
" appear to the Circuit court."

" Looking then to its past record, the bankrupt law,
" and the mandate of the Supreme court, what could the
" Circuit court require more than the facts we shall now
" mention in order to satisfy it that Hill had received his
" discharge?

" No sooner was the cause ordered re-docketed than
" Hill, by his attorney, presented to the court and asked

" leave to file his plea setting out his discharge *in hæc* " *verba*, and relying on it. (Rec., 61.)

" Now, the bare offer of this plea was enough to satisfy " the court on defendant's own showing, that he *had re-* " *ceived his discharge*, and that he *claimed the benefit of it*. " So much appeared by the offer, whether the plea was " accepted or rejected. Its rejection simply meant that " the defendant was to have the same benefits of the dis- " charge without a plea as with it; that the plea was un- " necessary and improper; that it was not commanded or " permitted by the mandate; that after verdict the cause " was too far advanced for pleas and pleadings; that no " re-trial, or second trial, had been awarded; that, on the " contrary, it had been denied, and the motion for it rest- " ing on a single and untenable ground had been ex- " plicitly and repeatedly overruled; that the first verdict " was to stand, and judgment to be entered upon *it*, that " there was to be no second verdict, nor anything for a " second jury to try.

" This court will see, as the Circuit court did, that the " clause in the mandates about 'its satisfactorily appear- " 'ing' that a discharge had been granted, was inserted " for our sake and protection and not for Hill's, to the " end that unless it did so satisfactorily appear, we might " take judgment absolutely on the verdict with execution. " If, therefore, the court was satisfied and we were satis- " fied when the plea was offered, showing the discharge " and the reliance on it, nothing further was necessary. " It was more than plenary proof; it was full confession, " both sides admitting the fact of a discharge. But this " is not all. After the fact of the discharge relied on " was so made to appear to the court by the offer of the " rejected plea, the plaintiffs presented to the court a duly

" certified copy of the certificate of Hill's discharge in " bankruptcy. The certificate of discharge bears the sig- " nature of both the judge and the clerk, and is under the " seal of the United States District court, and is word for " word identical with the discharge set out in the offered " plea alluded to, as comparison will show. (Rec., 65; " Rec., 63.)

" The authentication of this certificate is under the " hand of the clerk of the District court and under its " seal. Since the presentation of it by us was merely a " formal announcement to the court that we were satis- " fied by it, and were content that *the court* should be, as " to the existence of the discharge, the benefit of which " was sought by Hill, it was rather to be regarded as our " admission and waiver of evidence due from the other " side than as evidence which we were bound to fur- " nish. But, treated as evidence, and tried by the strict- " est rules of admissibility, it could not have been ex- " cluded.

" The certificate of the presiding judge never was ne- " cessary to the due authentication of the decrees and " judgments of the Federal courts, least of all in bank- " ruptcy.

" *Heath* v. *Hyde*, 87 Ill., 91.
" *Murray* v. *March*, 2 Haywood, N. C.,
" 290, decided by Chief Justice Marshall.
" *Clayton* v. *Hamilton*, 37 Texas, 269.
" *Adams* v. *Lisher*, 3 Blackfd. (Ind.), 243.

" The act of Congress containing that provision among " others applies only to inter-state and territorial judg- " ments. 1 Greenleaf's Evid., § 504; *Ducommon* v. *Hy-* " *singer*, 14 Ill., 250; and is *not exclusive of any other mode* " *of authentication which the states may think proper to* " *adopt*. 1 Greenleaf's Evid., § 505.

"The United States is *not a foreign government.* The "relations between it and the states are *domestic. Id.*, § 490. "Its laws are binding on the state courts. In this case the "courts of Illinois are administering its bankrupt law, and "enforcing the decrees of its courts.

"But opposing counsel says on page 51 of his brief:

"'Neither the signature of the alleged clerk, nor the "fact that he was clerk, nor the authenticity of the seal of "court were proved by any witness, nor in any way ex- "cept by the production of the paper itself.'

"There is nothing in this argument. 'The seal speaks "for itself,' says the Supreme court, 'and is presumed to "be affixed by the officer having the custody thereof, as "well as competent authority to do the act.'

"*Ducommun* v. *Hysinger*, 14 Ill., 250.

"Even if the presiding judge's certificate were neces- "sary, which I have before shown was not the case as to "orders and judgments of the United States courts as dis- "tinguished from inter-state and foreign courts, it would "not certify either to the seal or the official identity of "the clerk.

"'The judge,' continues the same opinion, 'has only to "certify that the attestation is in due form. He is not re- "quired to state that the person who certifies the record "is the clerk of the court, or that the seal attached by him "is the seal of the court.' 14 Ill., 250.

"But the 13th section of chapter 51, of the Illinois Stat- "utes on Evidence and Depositions, *a new section* intro- "duced into the chapter in July, 1872, (Acts of 1872, p. "405), admits the certificate in evidence without the ne- "cessity of a certificate from the presiding judge, if ever "it was necessary before.

"That section provides that 'records of courts may be

"proved by a copy thereof, certified under the hand of "the clerk of the court having the custody thereof and "the seal of the court, precisely as the certificate of dis- "charge in bankruptcy is certified in this case. Hence, if "the act of Congress could possibly be construed as appli- "cable to proof of judgments of federal courts, still not "being exclusive, as already seen, this new 13th section of "the Illinois Statute supplies one more sufficient and com- "petent mode of authentication covering this case. The "section is not confined to records of courts of this state. "The context shows it. See, also, commentaries in Un- "derwood's Stat. Evid. & Dep., Sec. 13. *Phillips* v. *Web- "ster*, 85 Ill., 148, *and refs.* *Heath* v. *Hyde*, 87 Ill., 91.

"Just at this point in the present brief we discover that "section 4992 of the Bankrupt Law itself forecloses all dis- "cussion by providing that: 'The proceedings in all cases "of bankruptcy shall be deemed matters of record; * * and that 'copies of such records, duly certified under "the seal of the court, shall in all cases be presumptive "evidence of the facts therein stated.'

"Therefore, the certificate of discharge so admitted and "considered by the court, was sufficient either alone or in "conjunction with the offered plea to establish the fact of "discharge to the satisfaction of the court.

"But, as if bent on supplying the court with the most "absolute and convincing proofs that the defendant had re- "ceived his discharge thus produced to the court by us, "and that he finally claimed the benefit of the same by "motion, his counsel, straightway after its production, en- "tered two consecutive motions for judgment in defend- "ant's favor 'upon the evidence of the discharge in bank- "ruptcy of said defendant *introduced herein*.' (Rec., 70, "71), and is now here assigning errors because such

" judgments were not entered on the same evidence (Rec., " 78). If this is not *felo de se*, what is?

" One point more: The Appellate court is the tribunal " of last resort on controverted questions of fact. The " eighty-fourth section of the Practice act provides that " on appeals from the Appellate to the Supreme court, " the latter shall examine questions of law only, and '*no* " *assignment of error shall be allowed which shall call in* " *question* the determination of the inferior or Appellate " courts upon controverted questions of fact,' excepting " certain matters having no relevancy to the present suit. " See 95 Ill., 168; 91 Ill., 523; 91 Ill., 496; 94 Ill., 55; " 100 Ill., 391.

" Now, if the discharge of Hill in bankruptcy rises, in " your Honors' estimation, to the dignity of a controverted " question of fact, after the admission of it by both parties " in the Circuit and Appellate courts, and here also, after " Hill's claiming the benefit of it there and again here by " his tendered plea, and after moving twice for judgment " in his favor on the certificate of discharge produced in " court, then we submit that question of fact is finally " settled by the judgment of the Appellate court, and no " error is here assignable upon the latter's determination."

Respectfully submitted.

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